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Administrative Conference of the United States

Recommendations and Reports

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Administrative Conference of the United States

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Administrative Conference of the United States

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RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

80-1 THROUGH 80-6

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RECOMMENDATION 80-1: TRADE REGULATION RULEMAKING UNDER THE MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT*

(Adopted June 5-6, 1980)

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Pub. L. 93-637, established special procedures for the adoption of trade regulation rules by the Federal Trade Commission. The Act also created a program for the reimbursement of the expenses of participants in trade regulation rulemaking who qualify for funding under criteria set forth in that statute.

Recommendations 79-1 and 79-5, adopted by the Administrative Conference in June and December of 1979, respectively, dealt with the Federal Trade Commission's implementation of the statute through the hearing stage of the rulemaking proceeding, and with the Commission's administration of the expense-reimbursement program. This recommendation supplements the two previous recommendations and completes the Administrative Conference's report to the Congress required by Section 202(d) of the Magnuson-Moss Act (as amended by Pub. L. 95-558.)

This recommendation, and the reports on which it is based, address the following topics: (1) the procedures used by the Federal Trade Commission in the posthearing stage of Magnuson-Moss rulemaking; (2) the value of Magnuson-Moss Act procedures generally, and (3) the effects of the expense-reimbursement program.

A. POST-HEARING PROCEDURES IN TRADE REGULATION RULEMAKING BY THE FEDERAL TRADE COMMISSION

The post-hearing stage of Magnuson-Moss rulemaking is complex and involves the following steps: preparation of the Presiding Officer's report; preparation of the rulemaking staff's report, with recommendations for a rule; opportunity for public comment on those reports; Bureau of Consumer

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* This recommendation supplements Recommendations Nos. 79-1 and 79-5.

Protection review, including the revision of staff's recommendations for a rule and the preparation of a summary of the "post-record" comments; oral presentations to the Commission by rulemaking participants; consideration of a final rule by the Commission; preparation of the statement of basis and purpose to accompany the final rule, and, finally, publication of the final rule and statement of basis and purpose in the Federal Register.

Under even the best of circumstances, this would be a lengthy process. However, in most proceedings studied, the FTC and interested persons had to contend, in addition, with massive, poorly-organized records generated during earlier, unfocused prehearing and hearing stages. *See* the preamble to Recommendations 79-1 for a description of the conduct of those stages. Consequently, the post-hearing stage of Magnuson-Moss rulemaking has been protracted. In the eight proceedings to reach the Commission for final action by April of 1980, the average time from the end of the oral hearing to the first Commission meeting to consider the rule was more than 27 months. In the three proceedings ending with promulgation of a final rule, the average time from the first Commission meeting to consider the rule to publication in the Federal Register was an additional 8.5 months.

The massive, poorly-organized records in most of the early Magnuson-Moss rulemakings are symptomatic of a basic problem observed in the FTC's trade regulation rulemaking proceedings: that is, the failure of the FTC to recognize that effective implementation of the Magnuson-Moss Act requires even more emphasis on procedural and substantive structuring than agencies have traditionally used for informal rulemaking under 5 U.S.C. § 553. Instead, the appropriate substantive structuring—the focusing and narrowing of the issues—often did not take place until late in the post-hearing stage of the proceedings, and, in many instances, not until the very end of the administrative process. The FTC Commissioners' general lack of involvement in the process until the very end, and the absence of any "feedback" from them to staff and interested persons during most of the process, further contributed to the problem of lack of structure. As a result, public input—by means of rebuttal, "post-record" comments and oral presentations—was not focused narrowly on issues or information of significance to the Commissioners.

In addition to greater intermediate structuring or narrowing of the issues by the Commissioners, there should also be more emphasis on structure at the end of the proceeding because the issues in most trade regulation rulemaking proceedings are likely to remain highly complex, and the records will probably continue to be large. Specifically, the Commissioners should have procedures which assure that they systematically consider and respond to all significant comments submitted by interested persons during a rulemaking proceeding. It should be recognized that the Commissioners will necessarily have to consult with the rulemaking staff, as well as other staff (*e.g.*, economists in the Bureau of Economics), in analyzing and evaluating the record of a proceeding.

B. GENERAL RECOMMENDATIONS WITH RESPECT TO THE PROCEDURES REQUIRED BY MAGNUSON-MOSS ACT

The Administrative Conference's study of the implementation of the Magnuson-Moss Act by the Federal Trade Commission provides compelling evidence that a statutory requirement for the mandatory use of the procedures contained in that act is not an effective means of controlling an agency's discretion in its exercise of a broad delegation of legislative power which has not acquired, in law, specific meaning. The Magnuson-Moss Act procedures can only be effective when the substantive decision-making process is structured, as in adjudication, by fairly detailed legal or technical standards which establish the boundaries on the inquiry and inform the participants what kinds of information are relevant and probative. This type of structure was lacking in trade regulation rulemaking by the FTC, and consequently, the combination of additional procedural requirements with informal notice-and comment procedures caused delay and uncertainty in the rulemaking proceedings, and appears to have contributed to judicial reversal of final rulemaking actions. Although the Conference concludes that procedures in addition to section 553 procedures should not, as a general matter, be statutorily required, agencies may decide to use such procedures—or other procedures—in the light of the circumstances of particular proceedings. Such action by agencies would be consistent with past Conference recommendations. *See* ACUS Recommendations 72-5 and 76-3.

The Conference's study of Magnuson-Moss rulemaking also shows that imposition of novel procedural requirements, such as those in the Magnuson-Moss Act, is likely to have high transition costs if applied to pending proceedings. Even if applied only to new proceedings, however, sufficient lead time is required for the agency to develop the procedures and internal structure needed to implement the new procedures. Thus, for example, reasonable time must be provided for an agency to adopt specific rules of practice and procedure to govern the conduct of the proceedings; to develop the staff and structure needed to index, organize, and make available a useful rulemaking record; to make available and train presiding officers to conduct the proceedings, and to inform and instruct its staff with respect to the new procedural requirements.

C. EVALUATION OF THE MAGNUSON-MOSS ACT'S EXPENSE-REIMBURSEMENT PROGRAM

In Recommendation 79-5, the Conference concluded that the expense-reimbursement program was being implemented faithfully and efficiently in accordance with the statute, and adopted a number of recommendations concerning the administration of the program. The Conference reserved action on larger questions relating to the value of the program.

Although the overall value of reimbursed participation is impossible to quantify, reimbursed participants in the Commission's proceedings have provided a variety of viewpoints and information on relevant issues that would not otherwise have been presented. Through briefs and oral argument, they helped to focus the Commission's attention on matters which had not been highlighted by other participants. In addition, they developed empirical data which was useful to the Commission; effectively cross-examined witnesses presented by other parties and by staff, and presented expert testimony. These contributions to the Commission's proceedings attest to the value of the program.

The proceedings under the Magnuson-Moss Act have frequently raised complex technical and legal issues which required expert legal representation and a capacity to deal with sophisticated scientific and analytic concepts. In this circumstance, the fact that a relatively small number of participants received substantial compensation in several procedings does not demonstrate a defect in the design or implementation of the program.

Although reimbursed participants often agreed with staff to the extent of believing that a rule should issue, many significant differences between the positions of the reimbursed participants and the Commission staff emerged. General agreement as to the need for a rule did not prevent reimbursed participants from presenting vigorously critical analyses of staff positions in proceedings or from presenting independent data and viewpoints which enriched the record. Moreover, staff positions were altered during the course of several proceedings, so that agreement between staff and reimbursed participants at the outset disappeared during the proceeding.

A. Recommendations With Respect to the Administration of the Magnuson-Moss Act by the Federal Trade Commission

In trade regulation rulemaking under the Magnuson-Moss Act:

1. It is essential that the Federal Trade Commission structure the rulemaking proceedings to narrow and focus the issues early in the proceeding and prior to the holding of the hearing required by section 18(c) of the Federal Trade Commission Act. It is highly desirable that the Commissioners themselves participate in and approve the narrowing and focusing of the issues to be explored at that hearing.

2. In taking final action, the Commissioners of the Federal Trade Commission should systematically consider and determine the agency response to all significant information and argument presented by interested persons during the rulemaking. Such presentations and the agency's response to them should be summarized in the statement of basis and purpose accompanying a final rule. The Commissioners should have the assistance of the Bureau of Consumer Protection's rulemaking staff, as well as other Commission staff, during their analysis and evaluation of the record in the proceeding.

B. General Recommendations With Respect to the Procedures Required by the Magnuson-Moss Act

1. The procedures in the Magnuson-Moss Act have not proved to be effective in controlling the agency's discretion in its exercise of a broad delegation of legislative power, and it is recommended that Congress not rely on such procedures for such a purpose.

2. Moreover, because of the inherent difficulty of managing a proceeding and developing a coherent record where portions of the proceeding are to be conducted pursuant to the Section 553 model, and other portions according to additional procedures mandated by statute, often without a clear line of demarcation between the two portions, there is high likelihood of delay and uncertainty and an increased risk of judicial reversal on procedural grounds. For this reason, Congress should not ordinarily require, for agency rulemaking, procedures in addition to those specified by § 553 of the Administrative Procedure Act, although the agencies should have the discretion to utilize them.

3. Statutes which impose novel procedural requirements, like those contained in the Magnuson-Moss Act, on particular agency functions involve high transition costs if they are applied to pending agency proceedings. Consequently, the statutes should, by means of delayed effective dates or otherwise, provide significant lead time to enable the agency to develop the necessary procedural and administrative practices and structures before commencing proceedings under the new procedural requirements.

C. Recommendations With Respect to the Magnuson-Moss Act's Expense-Reimbursement Program

1. If the Magnuson-Moss Act's procedures remain in effect, the participant reimbursement program under the Magnuson-Moss Act should be continued without substantial modification.

2. If a group appears to have the capacity to make a significant contribution to a proceeding and it meets the statutory criteria, it should be eligible for reimbursement. No limit should be placed on the number of proceedings for which a group can be reimbursed, and no arbitrary ceiling on the amount of reimbursement to any group in a particular proceeding or year should be imposed.

3. Mandatory cost-sharing requirements should not be imposed, since they might prevent presentation of valuable viewpoints and evidence. Fee schedules and overhead allocation formulas should be periodically reviewed to assure that participants are adequately reimbursed for expenses incurred.

4. Public participant reimbursement programs should not preclude reimbursement of participants who support or favor the position of the agency staff. In deciding how reimbursement funds should be disbursed

among agencies and proceedings, decision-makers should take into account the fact that reimbursement programs are likely to be most valuable in agencies or proceedings where there is a substantial difference between the positions of the agency staff and groups seeking reimbursement. They should also consider the amount likely to be spent by other participants who are not relying on the reimbursement program.

Separate Statement of Kenneth Culp Davis

The main idea in Recommendation 80-1 is that Magnuson-Moss rulemaking procedures do not effectively limit the Commission's discretionary power. I fully agree.

But that idea is negative, and because it is negative it seems to me inadequate. Congress has directed the Administrative Conference to study Magnuson-Moss procedures and to report. My belief is that Congress seeks affirmative understanding that will help it determine what rulemaking procedures it should require. I am disappointed that the Conference, after spending more than $600,000 on the study of the Commission's experience, fails to provide Congress with constructive suggestions of the kind that are much needed.

The Magnuson-Moss Act prescribes eleven items of procedure, ten of which have proved to be generally satisfactory—a notice stating with particularity the reasons for the proposed rule, public availability of all written submissions, a requirement that the rule be based on the rulemaking record, opportunity to submit rebuttal submissions in writing, findings and reasons that go beyond a statement of basis and purpose, oral argument, time limits, taking a transcript, public availability of the transcript, and a requirement of "substantial evidence in the rulemaking record." Congress may properly consider whether all or most of those ten requirements should be added to § 553 of the Administrative Procedure Act.

Excessive cross-examination has been the central cause of the Commission's procedural failures, even though the statute is well-designed to protect against it. The statute even authorizes the Commission to forbid all cross-examination by private parties, it limits cross-examination to "disputed issues of material fact it is necessary to resolve," and the Commission's rule properly requires designation of such issues before hearing. But the Commission moved away from both the statutory limitation and its rule.

The Conference should now face the vital problem of what should be the role, if any, of cross-examination in making rules of general applicability. I believe, as the Conference said in Recommendation 72-5, that "trial-type procedures should never be required for rulemaking except to resolve issues of specific fact," and I believe the Conference should now go further and should recommend to Congress that it should forbid cross-examination except on *disputed issues of specific fact it is necessary to resolve*, defining ''disputed issues'' as those on which procedures short of trial-type procedure have been sufficiently used without resolving the issues, defining ''specific fact'' so narrowly that cross-examination by private parties when an agency is making rules of general applicability will be very rare and will not be allowed at all in most proceedings, and defining ''issues . . . it is necessary to resolve'' as issues susceptible of proof with evidence and whose resolution is essential to the formulation of the rule.

RECOMMENDATION 80-2: ENFORCEMENT OF PETROLEUM PRICE REGULATIONS

(Adopted June 5, 1980)

The Emergency Petroleum Allocation Act of 1973 provides the President with broad pricing and allocation authority over petroleum products. Pursuant to this authority, a succession of agencies—including the Federal Energy Office (FEO), the Federal Energy Administration (FEA), and, since the passage of the Department of Energy Organization Act of 1977 (DOE Act), the Department of Energy (DOE)—have promulgated and enforced regulations implementing this Act.

All of these agencies have provided for administrative adjudications of contested remedial orders alleging violation of petroleum pricing regulations and seeking refund of overcharges. Congress, however, has expressly excepted these enforcement proceedings from the adjudicatory provisions of the Administrative Procedure Act. As a consequence, remedial order proceedings in these agencies, particularly FEO and FEA, have been less formal than APA proceedings and subject to intense criticism for failing to provide for full evidentiary hearings as a matter of right as well as for failing adequately to separate prosecutorial and judicial functions of agency personnel.

In the DOE Act, Congress acted to correct these perceived procedural deficiencies in the adjudication of remedial orders. Where a remedial order is contested, Section 503(c) of the Act provides an opportunity for an evidentiary hearing, including a right of cross-examination to the extent necessary for "full and true disclosure of the facts." Moreover, to guarantee a complete separation of prosecutorial and judicial functions, this hearing takes place at the Federal Energy Regulatory Commission (FERC), an independent agency within DOE not subject to the control of the Secretary of Energy.

The executive wind of DOE, however, has continued to provide for its own adjudicatory procedures when its "proposed" remedial orders are contested. All such cases are tried before the Office of Hearings and Appeals (OHA), an executive administrative unit that reports directly to the Secretary. Orders issued by OHA may then be contested at FERC pursuant to section 503(c). The net result of this approach is that two layers of administrative procedures now exist for the adjudication of remedial orders.

Elimination of Administrative Duplication

Administrative duplication can largely be eliminated either by abolishing the executive adjudicatory procedures presently utilized by the Office of Hearings and Appeals, or by abolishing the statutorily required hearing procedures at FERC. For a variety of reasons, abolishing FERC review of executive remedial orders is the preferable alternative.

FERC has little or no expertise in oil pricing matters. Moreover, it is already charged with enormous day to day responsibilities, including the implementation and enforcement of the exceedingly complex Natural Gas Policy Act. More importantly, an administrative structure that entrusts an independent commission with the power to review orders issued by a separate executive agency risks encouraging substantial policy fragmentation between the reviewing commission and the executive agency charged with the primary responsibility for promulgating rules and establishing policy in the first instance. There can be little justification for an administrative structural arrangement that risks such fragmentation, especially since the adjudicatory procedures used by the Department of Energy represent a substantial improvement over the more informal procedures followed by its predecessors.

Improvement of Administrative Procedures

As a corollary to abolishing FERC review, certain changes should be made in DOE procedures to conform generally with the APA's requirements for formal adjudications. Considerable controversy has developed over procedural provisions dealing with the burden of proof, the right of a litigant to an evidentiary hearing for resolving a disputed issue of material fact, the application of the agency's discovery rules, and the agency's failure to use administrative law judges. Given the nature of enforcement cases in general and the complexity and often enormous amounts of money at stake in these proceedings, application of the adjudicatory provisions of the APA to DOE's remedial order proceedings would be appropriate. APA proceedings can significantly increase the overall perception of fairness of the process on the part of the litigants, and will not unduly hamper the efficiency of the agency. Moreover, to ensure that an independent decisionmaker is involved at the crucial record formulation stage of these proceedings, administrative law judges should be used on a regular basis. Finally, given the particular importance of discovery in these proceedings, litigants should be afforded discovery rights which accord with the model provisions set forth in Recommendation 70–4.

Simplification of Duplicative Judicial Review

Once the internal problems of administrative duplication and procedure are solved, there remains an overarching problem—duplication of judicial review. A final remedial order issued by DOE is appealable to a United States district court, the decision of which may be appealed to the Temporary Emergency Court of Appeals. An appellate standard of review is employed at both judicial levels. This approach unnecessarily provides two essentially identical levels of judicial review.

Recommendation

1. *Administrative duplication.* FERC review of remedial orders issued by the Department of Energy pursuant to section 503 of the Department of Energy Organization Act unnecessarily duplicates the adjudicatory proceedings currently provided within DOE, risks substantial policy fragmentation between FERC and DOE, and is unnecessary to attain adequate separation of prosecutorial and judicial functions. Congress should, therefore, amend section 503 of the DOE Act so as to abolish FERC review of executive remedial orders and to provide DOE with authority to issue final remedial orders after meeting the procedural requirements set forth below in Paragraph 2.

2. *Administrative procedures.* Congress should require that final remedial orders may be issued by DOE only after opportunity for a hearing on the record in accordance with sections 554, 556, and 557 of the Administrative Procedure Act. In applying these provisions of the APA, DOE should use administrative law judges, provide for an appeal of ALJ decisions to the Secretary, and apply agency discovery rules in accordance with Recommendation 70–4 of the Administrative Conference. In advance of congressional action, DOE should, to the extent permissible by law, voluntarily adopt procedures consonant with the above principles.

3. *Judicial review.* Appellate review of final remedial orders by United States district courts unnecessarily duplicates the appellate function of the Temporary Emergency Court of Appeals. Congress should amend the Department of Energy Organization Act to provide that final agency remedial orders are appealable, as a matter of right, directly to the Temporary Emergency Court of Appeals, or to whatever other appellate court Congress may designate.

RECOMMENDATION 80-3: INTERPRETATION AND IMPLEMENTATION OF THE FEDERAL ADVISORY ACT

(Adopted June 5-6, 1980)

The Federal Advisory Committee Act was enacted in 1972 in response to a wide range of criticisms concerning the activities and influence of advisory committees operating within and alongside government agencies. The need for the large number of committees in existence was questioned, and there were complaints over lack of adequate public information concerning their purposes, their membership, the course of their deliberations, and the extent of their influence. In addition, fears were expressed that committees were often inadequately balanced to reflect the spectrum of interests affected by their recommendations. Finally, the Government seemed frequently to fail to implement, or even to respond to, important recommendations offered by prestigious committees after protracted and expensive research, hearings and study.

It cannot be expected that FACA in operation would have wholly silenced the criticisms which led to its enactment. Yet, the Conference's study does indicate certain positive results from FACA, including more careful evaluation by Government of the need for establishing or continuing advisory committees, more attention paid to their makeup and responsibilities, and more openness in their deliberations. We are not prepared to recommend at this time any major revision of the statute, either to embrace more activities by committees and similar groups, or to reduce the coverage and requirements of the Act. However, there are areas where clarification and perhaps some narrowing of coverage would ease problems of administration and remove artificial barriers to communication between the agencies and the interested public. In addition, a more vigorously coordinated implementation of FACA by the Executive Branch would provide more guidance to the agencies and the public and a more consistent application of FACA within Government and in the courts.

RECOMMENDATION

1. The Federal Advisory Committee Act directs the Office of Management and Budget to "prescribe administrative guidelines and management

controls applicable to advisory committees." This authority has since been transferred to the General Services Administration by Reorganization Plan No. 1 of 1977, and Executive Order 12024. Neither OMB nor GSA has made adequate use of this statutory authority to assist the agencies in resolving difficult questions involving the coverage of the Act, particularly the applicability of the Act to *ad hoc* and informally established advisory groups. As a result, courts have been faced with the need to resolve such issues without the assistance of authoritative administrative guidelines. Accordingly, GSA, in consultation with OMB and the Department of Justice, should undertake a revision of the guidelines at present contained in OMB Circular A-63, so as to provide greater assistance to the agencies, and, in particular, to deal with the problems of classification of committees experienced under the Act (see paragraph 2, below). The proposed guidelines should be made available to agencies and the general public for comment before they are finally issued, and upon issuance the guidelines should be widely published. Where a legal dispute concerning the applicability of the Act to particular advisory bodies cannot be resolved between the agency and GSA, the dispute may be submitted to the Department of Justice for resolution pursuant to Part 1-4 of Executive Order 12146.

2. The most serious problems regarding the coverage of FACA have involved the applicability of the Act (a) to groups convened by agencies, on an *ad hoc* basis, without formal organization or structure or continuing existence, to obtain views on particular matters of immediate concern to the agency, and (b) to privately established groups whose advice is "utilized" by an agency.

> (a) Uncertainty as to the applicability of FACA to one-time or occasional meetings between *ad hoc* groups and Government officials has tended to discourage useful contacts with the private sector. It is impractical to require such meetings to conform with the Act's requirements regarding chartering, advance notice, and structure of the committee. The Administrative Conference believes that the Act is not applicable to *ad hoc,* unstructured, non-continuing groups and that GSA's guidelines should make this clear. Coverge of such groups would not further the purposes of the Act.
>
> (b) The Conference believes that the definition of "advisory committee" is limited to committees either established by Government action or affirmatively supported and "utilized" by the Government through institutional arrangements which amount to the adoption of the group as a preferred source of advice. GSA's guidelines should make this clear.
>
> (c) Agencies should be sensitive to the desirability of making available to the public advice or information obtained from private or *ad hoc* groups not covered by FACA when the agency is considering action based on such advice or information.

3. Advisory committees frequently are useful in furnishing expert technical and scholarly advice to the Government, often at little or modest cost, and in providing a valuable channel of communication between the Government and the private sector. FACA has been successful in bringing about the elimination of many unnecessary advisory committees. It continues to serve a constructive purpose in requiring agencies and GSA periodically to evaluate the usefulness of each advisory committee, but such a review should be objective and should not be premised on any assumption that fewer advisory committees is a desirable goal in and of itself.

SEPARATE STATEMENT OF ALEXIS C. JACKSON

The consideration and study of the Federal Advisory Committee Act by the Administrative Conference has been a valuable and necessary exercise. However, I do have some reservations and additional comments to make regarding Recommentation 80-3, ¶¶ 2(a–c).

Recommendation 80-3, ¶ 2(a) causes substantial concern. We in the Department of the Interior have consistently interpreted the Advisory Committee Act to incluse so called *ad hoc* committees. We have based this interpretation on the clear statutory language of Section 3 of the Act together with the spirit of openness in government embodied in the Act. We believe our interpretation to be well-founded. When the courts have been presented with the question of the applicability of FACA to *ad hoc* committees they have, with only one exception, ruled that the committees are *not* exempt from the Act. In the one case where an *ad hoc* committee was held to be outside the Act, *Nader* v. *Baroody,* 396 F.Supp. 1231 (D.D.C. 1975), the decision reflected the possible constitutional consequences of restricting meetings within the Office of the President, together with the very loose nature of those meetings.

The recommendation to exclude *ad hoc* committees administratively is fraught with problems. If our interpretation is correct, the General Services Administration (GSA) would be powerless to amend the statute by its own interpretation. Any such attempted interpretation would lead only to confusion and ultimately to litigation by members of the public who have been excluded from viewing or participating in such meetings. It is likely that such litigation would be directed at the agencies that utilize such committees—not GSA.

Moreover, even if authorized, the recommendation invites abuse. Agencies seeking to circumvent the requirements of the Act would merely characterize committees as *ad hoc.* If an additional meeting or meetings are required, the agency could simply call another excepted *ad hoc* meeting. In the interest of a free and open democratic government, the chartering of all advisory committees should not be viewed as an overwhelming burden, even those which last for only several hours. The burden is in the artificial barriers imposed by GSA in the consultation process.

Similarly, I feel constrained to take issue with Recommendation 80-3, ¶ 2(b). The case of *Lombardo* v. *Handler,* 397 F.Supp. 792 (D.D.C. 1975), *aff'd,* 546 Fed. 1043 (D.C. Cir., 1976, *cert denied,* 431 U.S. 932 (1977), suggests a far more liberal interpretation of the term "utilize" than contemplated by the Recommendation. So does *Center for Auto Safety* v. *Cox,* 580 F.2d 689 (D.C. Cir. 1978). These cases foreclose the suggestion contained in the recommendation, ¶ 2(b). I believe GSA could assist agencies by more clearly defining "utilize" in its guidelines.

Recommendation 80-3, ¶ 2(c) underscores the need for careful consideration of the issues presented in the matter of FACA's interpretation. Paragraph 2(c) contains the mere precatory suggestion that agencies should be "sensitive" to the need for making advice received from *ad hoc* committees available to the public when considering action based on such advice. This might be read as a retreat from previous Conference expressions, see Recommendation 77-3, regarding making publicly available the substance of communications from outside the agency in pending rulemaking proceedings.

To conclude, I am not troubled by the interpretation the courts have given FACA. I do believe, however, that the chartering of committees should be facilitated by GSA rather than hindered by it. The consultation process originally contemplated was designed to be just that-consultation-and not one of final determination of whether a committee ought to be established. That determination is reserved to the agency head. If this original concept were to be reborn, agencies could more effectively and supportively comply with the Act.

As I read them, Recommendation 80-3, ¶¶ 2(a) and 2(b) seek to change the coverage and scope of the Act. This, of course, contradicts the preamble of Recommendation 80-3 which states "We are not prepared to recommend . . . any major revision to the statute . . . " In view of the stated intention, we believe the Conference should reconsider Recommendation 80-3, ¶¶ 2(a–c) and adopt a revised recommendation (attached) in accordance with the reviews outlined in this statement.

If on the other hand, the Conference does not revise Recommendation 80-3 ¶¶ 2(a–c), the substance of its proposal should be submitted for legislative action.

Attachment to Separate Statement

Suggested Revision of Recommendation 80-3, paragraphs 2(a–c):

2(a) *Ad hoc* groups which meet with government officials on a one-time or occasional basis are advisory committees under FACA. It is therefore necessary for such meetings to conform with the Act's requirements regarding chartering, advance notice, and structure of the committee. The Administrative Conference believes that conformance to the Act will be facilitated by GSA adhering to a consultant's role as contemplated in Section 9(a)(2) of the Act rather than a role of determining whether a committee should be established.

2(b) The Conference believes that the definition of ''advisory committee'' includes committees either established by Government action or supported and ''utilized'' by the Government through consideration by the Government of the committee's advice. GSA's guidelines should make clear the application of the term ''utilize.''

2(c) Advice or information obtained from private or *ad hoc* groups in an *ex parte* manner is not sanctioned. To the extent that agencies do receive such advice or information, the Administrative Conference believes that agencies should make such advice available to the public, particularly when the agency is contemplating action (such as rulemaking) which may be based on or use such advice or information.

RECOMMENDATION 80-4: DECISIONAL OFFICIALS' PARTICIPATION IN RULEMAKING PROCEEDINGS

(Adopted June 5-6, 1980)

Several recent lawsuits have challenged the propriety of an official's participation in rulemaking proceedings. In those cases, efforts were made to force the "disqualification" of persons whose judgment might shape an agency's regulations, much as disqualification might have been sought in an adjudicatory proceeding allegedly tainted by the adjudicator's bias.

The concepts of bias (real or supposed) pertinent to the fairness of a judicial trial or an administrative adjudicatory hearing have limited applicability to rulemaking proceedings. The political, legislative, and institutional aspects of the rulemaking function, and the frequency with which persons selected for policy-making responsibilities are selected precisely because they have previously declared their beliefs, make direct application of a judicial test for disqualification inappropriate. Moreover, the determinants of a "fair hearing" that are implicit in the due process clause are inapplicable in proceedings of an essentially legislative nature, whose procedures are controlled by statutory rather than constitutional provisions.

Nevertheless, the acceptability of regulations and, indeed, the repute of the administrative process may be seriously impaired if the judgment of agency officials who can determine the content of rules is considered to have been tainted by a conflict of interest, by an inflexible prejudgment of pertinent factual propositions, or by indecorous manifestations of hostility. Each administrative agency that possesses power to promulgate regulations should adopt procedures and standards that define whether an official should abstain (or, if need be, be barred by the agency) from participating in a particular rulemaking proceeding.

The recommendation that follows proposes minimum standards of propriety. More exacting standards may be formulated by an agency for the conduct of its affairs or may be self-imposed by an official who on his own motion chooses not to participate in a particular proceeding. The basic proposition underlying the recommendation is that unimpaired capacity to exercise a fully informed judgment, as well as freedom from personal, private interest in the outcome of particular matters, in implicitly demanded of those to whom Congress has granted power to formulate rules for the future.

The standards sketched here are consonant with those embodied in statutes that govern government employees' behavior, in statutory procedures that have generally been provided for rulemakings, and in the six precepts of ethical employee behavior formulated by the Office of Personnel Management.[1]

The following recommendation is directed toward agencies that conduct rulemaking proceedings under the informal procedures of the Administrative Procedure Act, 5 U.S.C. § 553, or particular statutes defining rulemaking procedures other than formal, on-the-record rulemaking. The recommendation relates solely to agency personnel with decisional responsibilities in the rulemaking process. Definition will perforce vary from agency to agency because of differences in internal organization and allocation of responsibility. No suggestion is made here that every public employee who, at one stage or another, may contribute in one manner or another to rulemaking proceedings is to be subjected to interminable tests of probity and objectivity before the ultimately responsible "decisional personnel" can act.

RECOMMENDATION

A. Procedures

1. Each rulemaking agency should promulgate procedures by means of which persons who desire to participate in a rulemaking proceeding (or who may be affected by its outcome) can challenge the suitability of participation by particular decisional personnel in that proceeding. The procedures should identify the factors that bear on suitability and should indicate the appropriate time, place, and means of making challenges, along with an indication of opportunity for intra-agency review if one be available.

2. The procedures should also make plain that a decisional official, whether or not challenged, may voluntarily abstain from participating in a particular proceeding.

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[1] 5 C.F.R. § 735.201a:

"An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government."

B. Conflict of Interests

1. A decisional official whose financial interests or those of whose immediate family may be distinctively favored by choices to be made in a particular rulemaking proceeding should voluntarily abstain (or be required by the agency to abstain) from participation in that proceeding, subject to publicly stated and applied agency exceptions for *de minimis* holdings.

2. New agency officials should be subjected to "cooling off" periods of variable duration, during which their participation in a rulemaking proceeding would presumably be inappropriate if

(i) the proceeding specifically affects the financial interests of an immediately prior employer or client; or

(ii) the official's immediately prior employer or client is a participant in the proceeding; or

(iii) the official has participated in the proceeding before becoming a public employee.

An agency's application of a "cooling off" requirement should not, however, reflect absolutes. It should take into account the following factors, singly or in combination:

(a) the extent of the official's participation in a prior private capacity in the pending rulemaking proceeding;

(b) the elapse of time between the prior involvement and the official's present activity as a public employee;

(c) the nature and magnitude of the rulemaking's possible impact on the interests of the prior employer;

(d) the generality or specificity of the rulemaking's scope;

(e) the extent of the prior employer's participation

(f) applicable professional standards;

(g) Senatorial consideration, during the confirmation process, of the official's prior relationships and activities.

3. An official's non-financial interests, associations, or activities (whether or not related to past employment) may in some instances suggest the desirability of recusal or, if need be, a direction to the official to abstain from participating in a particular proceeding. If the official's appointment has been confirmed by the Senate with knowledge of the appointee's past interests and activities, a required cooling off period would ordinarily be inappropriate. As to official's of lesser prominence, however, agencies may suitably utilize in respect of non-financial interests the procedures sketched above, related to financial conflict of interests or to cooling off periods. The question of precluding participation should arise only when an identifiable interest is significant in relation to the proceeding and is likely to be substantially affected by its outcome. Mere membership in an association would not ordinarily be a ground for disqualification or recusal.

4. Finally, agency conflict of interests rules should make emphatically

plain that they are in aid of the agency's self-management; that they are measures in furtherance of its own quality control rather than in amplification of judicial control; and that they are agency declarations for guidance of its own staff concerning decorum. An agency that is insensitive or lax in fulfilling its declared expectations will no doubt be of concern to the Congress or to the Executive, but an agency's heightened attentiveness to the qualities of decisional personnel should plainly not expand the occasions for or the scope of review of rulemaking proceedings.

C. Prejudgment of Fact

1. Disqualification for prejudgment in rulemaking should be limited to prejudgments of particular "adjudicative" or "specific" facts, where it may be inferred from the particular statutory framework, agency procedural choices, or other special circumstances that the agency's determination of those facts is to be based on the evidentiary record developed in the proceeding. Cause for disqualification can appropriately be decided by the agency only after it is established in the proceeding that such facts will be materially at issue in the proceeding. Such disqualification is inappropriate for factual judgments that are the consequence of earlier stages of the proceeding, or for prejudgments of policy.

2. To avoid undue interference with the legislative, policy-making aspect of the rulemaking process and other agency functions, disqualification for prejudgment of fact should be considered by the agency only after it has determined that critical "adjudicative" or "specific" facts require resolution on the evidentiary record developed in the proceeding, and should require at least a preponderant showing that an agency member or decisional employee has a closed mind regarding those facts.

D. Decorum and Expression of Views

A rulemaking proceeding should be conducted with decorum and respect for the interests of all concerned. Agency officials should therefore conscientiously avoid intemperate expression or other behavior suggestive of an irrevocable commitment to a predetermined outcome of the proceeding. This does not mean, however, that agency officials may not express factual judgments based on previous experience or on information received during a proceeding; nor does it suggest that officials may not act upon or voice opinions concerning underlying issues of policy. Expressing those opinions in interchanges with committees of the Congress, other administrative bodies, the public, and regulated groups is a desirable normality of administration, rather than an abnormality to be shunned, and is not a basis on which exclusion from a proceeding may appropriately be suggested.

RECOMMENDATION 80-5: ELIMINATING OR SIMPLIFYING THE "RACE TO THE COURTHOUSE" IN APPEALS FROM AGENCY ACTION

(Adopted December 11, 1980)

Many agency actions subject to direct review in the courts of appeals involve more than one private party that may legitimately consider itself aggrieved by the agency action. In most cases, a single court of appeals is not specified by statute as the reviewing court, and venue may lie in more than one such court. Many lawyrs believe that one court of appeals is likely to be more receptive than another to their clients' arguments in an agency review proceeding. The choice of the reviewing court has therefore assumed large importance in the review of some actions of some agencies.

A statute, 28 U.S.C. § 2112(a), provides that, when petitions for appellate review of the same order are filed in two or more courts of appeals, the record of the agency proceeding is to be filed by the agency in the court in which the first petition was filed, and that court then has jurisdiction of the review proceeding to the exclusion of others. This provision has become less and less useful as the choice of forum has become more significant in lawyer's minds, and races to the courthouse have proliferated and methods of conducting the races have become more refined. Races are now sometimes decided by seconds or fractions of seconds, if they can fairly be said to have been decided at all. (There is no single finish line to cross or tape to break; time stamping machines in clerks' offices are not synchronized.) Moreover, races will be even harder to judge as agencies adopt regulations, designed to make the races fairer and more civilized, specifying the date and time at which agency orders are deemed to have been issued.

The spectacle of the race to the courthouse is an unedifying one that tends to discredit the administrative and judicial processes and subject them to warranted ridicule. It will require Congressional action to bring the final curtain down on the spectacle. Our first and principal recommendation is addressed to Congress. It calls for simple random selection of the reviewing court when a race ends in a dead heat or near dead heat. Pending Congressional action, there are actions that the agencies and the courts themselves can take to ameliorate the present sorry situation, and we also make recommendations addressed to the agencies and to the Judiciary for such interim actions.

PART A. RECOMMENDATION TO CONGRESS

Congress should amend 28 U.S.C. § 2112(a) to provide that, if petitions to review the same agency order have been filed in two or more courts of appeals within ten days after the order was issued, the agency is to notify an appropriate official body, such as the Administrative Office of the United States Courts, of that fact; that the appropriate official body, on the eleventh day after the issuance of the order, is to choose from among the circuits in which petitions have been filed according to a scheme of random selection and notify the agency of that choice; and that the agency is then to file the record of the proceeding in the court so chosen, which will take jurisdiction and conduct the review proceeding, subject to the existing power, which would not be changed, to transfer the case to any other court of appeals for the convenience of the parties in the interest of justice.

The amended Section 2112(a) should provide further that a court of appeals in which a petition for review has been filed that has jurisdiction to entertain the petition may, in a case of pressing need, issue a stay of the agency order during the period in which no court has been chosen to take jurisdiction of the proceeding, the stay to remain in effect for no more than 15 days, unless extended by the chosen court or a transferee court, and subject to revocation or modification by the chosen court or a transferee court; and that, if the court in which the record is filed determines that is lacks jurisdiction or venue is improperly laid but that jurisdiction and venue may be proper in another circuit, the court is to notify the official body administering the system of random selection of that fact, and the body then will choose from among the remaining courts in which petitions have been filed according to the same scheme of random selection.

PART B. RECOMMENDATION TO THE AGENCIES

In the absence of legislation, those agencies whose actions have resulted or are likely to result in races to the courthouse should specify in advance a time at which their orders are to be deemed issued or their actions are otherwise ripe for judicial review. Such agencies should do this by generic regulation if possible, and if that is not possible, by specifying times of issuance or ripeness case by case.

PART C. RECOMMENDATION TO THE JUDICIARY

In the absence of further legislation, the Supreme Court should promulgate a rule under which, if petitions to review the same agency order are filed in two or more courts of appeals simultaneously (for example, within one minute of one another), the Administrative Office of the United States Courts is to be informed of that fact, and the Administrative Office is then to choose one court, according to a scheme of random selection, from among the circuits in which such simultaneous petitions are pending, which court shall then determine where the record is to be filed pursuant to 28 U.S.C. § 2112(a).

RECOMMENDATION 80-6: INTRAGOVERNMENTAL COMMUNICATIONS IN INFORMAL RULEMAKING PROCEEDINGS

(Adopted December 12, 1980)

The growing complexity and scope of government regulation resulting from informal rulemaking proceedings have increased the importance of communication and coordination among agencies. Because the President, as the nation's Chief Executive, may be deemed accountable for what agencies do, efforts to achieve policy coordination through Presidential channels have become increasingly significant.

In recent years the President has attempted to do this through a variety of analytical and procedural mechanisms, such as the promulgation of Executive Order 12044 and establishment of the Regulatory Analysis Review Group and the Regulatory Council. This exercise of Presidential direction has not been limited to the establishment of general mechanisms, however. The President, his advisers, and units of the Executive Office have also on occasion intervened directly in the formation of policy during particular rulemaking proceedings. This intervention has raised questions by private participants about the manner in which executive influence should be exercised.

This recommendation addresses the appropriate standards for communication to Executive departments and agencies from the President, advisers to the President, units of the Executive Office, and other Executive branch and independent agencies when the recipient agency is making policy decisions through the process of informal rulemaking. It pertains to rulemaking of general applicability, not to proceedings (whether rulemaking or adjudication) that involve the distribution, modification or withdrawal of valuable privileges to identifiable private interests. To some degree it is a corollary to ACUS Recommendation 77-3, which is concerned with restrictions upon private participants' oral and written communications in informal rulemaking.

The recommendation is based upon the need to accommodate two competing elements of a good rulemaking process. The first is the desirability of being able to identify a coherent body of factual information upon which the rulemaking agency's decision is based, and to make this information available to all-other participants in the process, the staff of the agency itself, and reviewing courts. The second is the desirability of affording government officials opportunity to engage in uninhibited internal debate over the policy implications of this body of information, subject only to the requirement that the ultimate conclusion be rational and adequately explained.

Both principles are recognized in the recommendation. Units of the government other than the one conducting the rulemaking may have perspectives or expertise not readily available to the rulemaking agency that would enhance the quality of internal debate on the implications of the information in the public file, and their participation should be encouraged. At the same time, rulemaking agencies should not permit, and other units of the government should not request, any opportunity to introduce into the proceeding material factual information (as distinct from indications of governmental policy) not made available to other participants.

The Conference is also concerned with avoiding any possibility that intragovernmental communications from outside the rulemaking agency might serve as undisclosed or inadvertent conduits for new material factual information, and with providing adequate opportunities for other participants to respond to material factual information that is introduced.

The recommendation addresses the degree to which agencies should be free to receive certain kinds of intragovernmental communications in informal rulemaking without having a duty to place them in the public file of the proceeding. It is not intended to suggest any limitation on the discretion of any rulemaking agency to disclose such communications to the public.

RECOMMENDATION

1. Any Executive department or agency engaged in informal rulemaking in accordance with the procedural requirements of section 553 of the Administrative Procedure Act should be free to receive written or oral policy advice and recommendations at any time from the President, advisers to the President, the Executive Office of the President, and other administrative bodies, without having a duty to place these intragovernmental communications in the public file of the rulemaking proceeding except to the extent called for in paragraph 2.

2. When the rulemaking agency receives communications from the President, advisers to the President, the Executive Office of the President, or other administrative bodies which contain material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule, the agency should promptly place copies of the documents, or summaries of any oral communications, in the public file of the rulemaking proceeding. All communications from these sources containing or reflecting comments by persons outside the government should be so identified and placed in the public file, regardless of their content. A rulemaking agency should consider the importance of giving public participants

adequate opportunity to respond if the material presents new and important issues or creates serious conflicts of data.

3. The Administrative Conference takes no position in the present recommendation concerning rulemaking by other than Executive departments and agencies.

SEPARATE STATEMENT OF WILLIAM A. BUTLER, PETER A. BRADFORD, LAURENCE GOLD, CHARLES R. HALPERN, RHODA H. KARPATKIN, ALAN B. MORRISON, KATHERINE E. SASSEVILLE, AND THOMAS M. SUSMAN

We oppose this recommendation because we believe that Executive Branch agencies should be encouraged to disclose, not withhold, all of the factors which may have influenced their decisions in informal rulemaking. The public's right to know the reasons for a decision far outweighs agency decisionmaker's rights to secrecy. We have heard no arguments and are aware of none which convince us that putting written material and summaries of oral comments in the public record created during informal rulemaking will inhibit robust debate in that process. This recommendation takes on added importance given the current trend in administrative law away from cumbersome formal adjudications and towards streamlined informal notice and comment rulemaking. Our fear is that this recommendation will invite public cynicism regarding informal administrative rulemaking, and generate contempt for a process where *post hoc* agency rationales carefully selected from the public record are offered as the bases for decisions reached for what may well be quite different, undisclosed and perhaps legally irrelevant reasons. Such a perception of Executive Branch rulemaking will undermine public confidence in the integrity of agency decisionmaking.

This recommendation extends beyond the President and his closest advisors and allows all Executive Branch agencies to involve themselves secretly in informal rulemaking. In our view agencies should be encouraged to provide their views during the public comment period so that the public might respond, or at least be aware of the views expressed. The recommendation actually encourages Executive Branch agencies as well as the White House to wait until the public record is closed before making their views known. At a minimum, we believe a summary of all oral comments and copies of written comments should be placed in the public file as soon as possible, and in no event later than the date when the rule is promulgated.

We also believe that the fact/policy distinction set up by the recommendation is unworkable in practice. "Material factual information" can easily overlap or be intertwined with "policy advice" or "indications of governmental policy." Indeed, agencies often make that precise point in resisting disclosure under the Fredom of Information Act. There will be an inevitable bias in favor of non-disclosure for fear of revealing "policy advice,'' and there is no means for the public to know that an agency has made a determination that a particular comment will not be disclosed or to seek judicial review of that determination. Further, we do not understand how a recipient agency is to know whether comments from another agency or the White House are ones ''containing or reflecting comments from persons outside the government'' using their governmental contacts as conduits, or how the recommendation's supposed safeguard in this respect will be policed. We also believe that in any but the most extraordinary circumstances, a rulemaking agency should give public participants ''adequate opportunity to respond if the material presents new and important issues or creates serious conflicts of data'' and not simply ''consider'' doing so.

In all likelihood this recommendation will expose agency heads to increased political pressures from either other executive agencies or outside groups who will use those agencies as conduits. Such pressures are likely to include considerations other than those made relevant by the statutes which the particular rulemaking implements. Moreover, the courts will be unable to serve as a check upon consideration of statutorily irrelevant factors since they cannot review that which is not disclosed.

We are not trying to shut off Executive Branch comment, to impose onerous burdens imported from formal adjudications on informal rulemaking, to prolong or delay governmental decisionmaking, or to provide procedural opportunities for subsequent litigation. Nor do we doubt that future Presidents must control federal Executive Branch agencies more effectively, and ultimately be held accountable for their actions. The dispute here is over whether the recommendation is a fair, or even a necessary, way to achieve these ends.

We simply do not see the reason for promoting secrecy. Disclosure is simple and fair. Policies promoting secrecy over disclosure in rulemaking do not constitute good government. Therefore, we dissent.

CONSULTANT REPORTS IN SUPPORT OF RECOMMENDATIONS

80-1 THROUGH 80-6

REPORT IN SUPPORT OF RECOMMENDATION 80-1

PHASE II REPORT ON THE TRADE REGULATION RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION*

by Barry B. Boyer

OUTLINE OF REPORT

- I. Overview of the Posthearing Procedures
- II. The Roles of the Participants
  - A. The Presiding Officers
  - B. The Rulemaking Staff
  - C. The FTC's Middle Management
  - D. The Commissioners
  - E. Outside Participants
- III. Assessment of the Hybrid Rulemaking Procedures Employed by the FTC
  - A. Criteria for Evaluation
  - B. Accuracy
    - 1. Lack of procedural structuring
    - 2. The nature and timing of substantive structuring
  - C. Fairness and Acceptability
  - D. Efficiency
    - 1. Cost
    - 2. Delay
- IV. General Characteristics of Hybrid Rulemaking
- Data Appendix

I. OVERVIEW OF THE POSTHEARING PROCEDURES

After the oral hearings have concluded, a trade regulation rulemaking proceeding still has a substantial distance to travel before final Commission action. Typically, there are three additional opportunities for public participation: submission of rebuttal materials, filing of final comments, and presentation of oral statements to the full Commission. Only one of these procedural stages—the opportunity to submit rebuttal—is explicitly required by the Magnuson-Moss Act.

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*This report is a follow-on to Boyer, *Trade Regulation Rulemaking Procedures of the Federal Trade Commission* (unpublished report to the Administrative Conference, May 1979), which served as the basis for Recommendation 79-1.

More specifically, in a proceeding conducted according to the Rules of Practice, the sequence of events during the posthearing stage of the process is as follows:

1. *Rebuttal.* Interested persons are given at least thirty days after the close of hearings to file rebuttal submissions.[1] Both the statute and the Rules of Practice give interested persons the right to conduct cross-examination and submit rebuttal only with respect to disputed issues of material fact. Neither the statute nor the Rules distinguishes between oral and written rebuttal, and neither explicity requires that the rebuttal opportunity be separate from the oral hearings.[2]

2. *Presiding Officer's Report.* Under the "Rules of Practice" procedure, the Presiding Officer's report is issued before the final report of the rulemaking staff is released.[3] As discussed below,[4] the Presiding Officer's report is more limited in its coverage of issues and in its analysis of record evidence than the staff's. In some of the more recent TRR proceedings, starting with the R-Value rule, the report-writing sequence has been reversed and the Presiding Officer has been instructed to confine his report to points of disagreement with the staff report.[5]

3. *Staff Report.* While the staff report usually follows the Presiding Officer's in the sequence of posthearing events, the drafting of these two documents takes place simultaneously.[6] Typically, the staff report in a

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[1] In fourteen TRR proceedings, the rebuttal period ranged from a low of 30 days in the Vocational Schools and Health Spas proceedings, to a high of 155 days in the Mobile Homes proceeding. The average length of the rebuttal period in these proceedings was 69 days. *See* Appendix B to this report.

[2] *See* 15 U.S.C. § 57a(c)(1) (1976); and 16 C.F.R. § 1.13(d)(5) (1980), respectively.

[3] In fact, the Rules of Practice state that the rulemaking staff must take "into account" the Presiding Officer's findings of fact in writing their report. 16 C.F.R. § 1.13(g) (1980).

[4] *See* text accompanying notes 28 to 29, *infra.*

[5] The Notice of Rulemaking in the R-Value proceeding stated:

> Not later than 45 days after the close of the rebuttal period the staff shall submit its report as required by § 1.13(g) of the Commissions rules. The Presiding Officer's report shall be submitted not later than 30 days thereafter and shall be confined to points of difference with the staff.

42 Fed. Reg. 59678, 59684–85 (Nov. 18, 1977). *See also* 43 Fed. Reg. 57269, 57283 (Notice of Proposed Standards and Certification TRR); 43 Fed. Reg. 17967, 17972 (Notice of Proposed Children's Advertising TRR) for similar provisions.

[6] Preparation of the Presiding Officer and staff reports had to go on simultaneously, given the tremendous volume of material in the records (*see* Data Appendix to the ACUS Phase I Report, Item 9). Moreover, the Rules of Practice required that both the Presiding Officer and staff analyze the whole record, at least with respect to the designated issues. However, the fact that the staff report was issued soon after the Presiding Officer's in the Vocational Schools TRR proceeding led to the following charge that staff never seriously considered the more favorable findings of the Presiding Officer:

Rules of Practice proceeding will include some extended discussion, either in revised text or in a separate section, responding to points in the Presiding Officer's report with which the staff disagrees.[7] The staff report is intended to be a comprehensive analysis of all the evidence and argument bearing on all of the issues in the proceeding.[8] In contrast to the Presiding Officer's report, it contains explicit recommendations on specific rule provisions.

4. *Final Comments.* Release of the staff report triggers the final opportunity for public comments, which are usually referred to as "post-record comments" or "PRC's" to distinguish them from the pre-hearing comments.[9] Under the Rules of Practice, the final comment period extends for 60 days after the release of the staff report, but in practice limited extensions of this period are fairly common.[10] The Rules of Practice also state that "such comments shall be confined to information already in the record and may include requests for review by the Commission of determinations made by the presiding officer."[11]

> The staff report concluded with a brief 18-page outline of the staff's differences with the Presiding Officer. Since the Presiding Officer's report was not available to the staff until September 1976 and the staff's cover memo with its Report was dated September 1976, it is apparent that staff completed its report before the Presiding Officer's report was available and later simply tacked a brief comment on the Presiding Officer's report as an appendage to their largely unrelated work.

Prepared Remarks of Robert L. Wald, Esq., Before the Conference on FTC Rulemaking Procedures and Practice, Practicing Law Institute, March 7–8, 1977 at 5–6. *See also* Report and Resolutions of the Section of Antitrust Law, American Bar Ass'n, Concerning FTC Trade Regulation Rulemaking 27 (Nov. 1979).

[7] As indicated in note 3, *supra*, the staff is directed to "take into account" the Presiding Officer's findings of fact.

[8] The complete Rules of Practice provision relating to the staff report is as follows:

> The staff shall make recommendations to the Commission in a report based on the rulemaking record and taking into account the presiding officer's findings of fact. Such report shall contain its analysis of the record and its recommendations as to the form of the final rule.

16 C.F.R. § 1.13(g) (1980).

[9] The term "post-report comments" is more accurate than "post-record comments." The second-round comment opportunity is provided to permit interested persons to respond to the Presiding Officer and staff reports, and the comments are supposed to be "confined to information already in the record," 16 C.F.R. § 1.13(h) (1980). This restriction was not enforced, and the comments occasionally did present new information. *See* text accompanying notes 114a to 114b, *infra.*

[10] *See* Appendix J to this report for the actual length of the "post-record" comment period in each proceeding.

[11] The entire provision governing post-record comments is as follows:

> The findings and conclusions of the presiding officer as well as the staff report shall be the subject of public comment for a period of sixty (60) days after the staff recommendations are placed in the rulemaking record. Such comments shall be confined to information already in the record and may include requests for review by the Commission of determinations made by the presiding officer.

16 C.F.R. § 1.13(h) (1980).

5. *Bureau Review.* After the close of the final comment period, the rule is subject to another round of evaluation within the Bureau of Consumer Protection. The staff prepares a summary of the post-record comments for the Commission, and in the process it may change its own position or feel the need to respond to points raised in the PRC's. Thus, there may be a lengthy staff memorandum analyzing factual, legal, or policy issues. The Bureau Director also prepares a memorandum for the Commission containing his own analysis of the key issues in the proceeding, focusing on any areas of difference with the staff.[12] These documents are generally made available to the public.

6. *Oral Presentations.* Following the final round of review within the Bureau, an "oral presentation" is scheduled before the full Commission. This is essentially an informal oral argument, in which selected group representatives and a few other interested persons meet with the Commissioners

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[12] In its report to Congress, the FTC described the scope of the Bureau of Director's review as follows:

> A draft of the staff report is reviewed by the Director of the Bureau of Consumer Protection with primary emphasis on the legal and policy bases for the staff recommendations. The bureau director prepares a separate memorandum . . . endorsing or disagreeing with the staff's position and recommendations. The bureau director has, in the recent past, used this opportunity to reevaluate the policy bases for each provision of the proposed rule and focus these issues for public comment and, in turn, for the Commission.

Report of the FTC on Rulemaking Under the Magnuson-Moss Warranty-FTC Improvement Act 55 (June 1979).

It is perhaps noteworthy, from an organizational viewpoint, that traditionally the head of the bureau gives his views separately from the rulemaking staff members who work in divisions within the bureau. One could question why there should be more than one "staff" position presented to the Commission. The present procedure has the advantage of exposing the Commissioners to a greater diversity of viewpoints. It may also maintain the morale of the staff attorneys assigned to the rule because they can present their position directly to the Commissioners even if the Bureau Director disagrees. However, while the procedure may be helpful internally, release of these conflicting documents can expose the agency to criticism such as the following:

> [T]he chief of the FTC Bureau of Consumer Protection, and thus the direct boss of the staff attorneys who prosecuted the [Vocational Schools] rule and wrote the staff report, issued a personal memorandum taking issue with her own subordinates on several key points. She aparently could not or would not induce the staff to incorporate her views in the staff report itself. . . . This separate [Bureau Director] statement, in the view of some, is reassurance that the top levels in the Bureau of Consumer Protection are not captives of their staff and will make at least an attempt to police staff efforts. In the view of others, it is depressing confirmation that the staff is not responsive—or apparently responsible—to its own management; like a runaway atomic pile, they are a process out of control.

Prepared Remarks of Robert L. Wald, *supra* note 6, at 6. Disagreements between the Bureau of Director and the staff may also arouse the suspicions of courts reviewing final rules. *See, e.g.,* American Optometric Ass'n v. F.T.C., No. 78-1687 (D.C. Cir. Feb. 6, 1980) (slip op. at 30–31).

in a round-table format to present their views and respond to questions from the Commissioners.[13]

7. *Final Action.* After hearing the oral arguments, the Commissioners generally hold one or more open meetings to debate rule provisions and reach agreement on the shape of a final rule. During this period the rulemaking staff drafts rule provisions to incorporate the Commission's decisions and also writes a final statement of basis and purpose, which is reviewed and approved by the Commission. Publication of the rule and the statement in the Federal Register completes the trade regulation rulemaking process.[14] Interested persons may then obtain pre-enforcement judicial review of the rule in the courts of appeal.[15]

In short, the post-hearing phase of a Magnuson-Moss rulemaking proceeding constitutes virtually another cycle of notice-and-comment rulemaking, with opportunity for an oral hearing. The process may take several years to complete.[16]

II. THE ROLES OF THE PARTICIPANTS

As the rules moved into the posthearing stages, some general tensions and difficulties that had emerged during the hearings become more intense. Many of these problems concerned the roles which the major participants had in the posthearing procedures.

A. The Presiding Officers

The Presiding Officers in trade regulation rulemaking proceedings faced a number of questions regarding their status and duties. From the time the first draft Rules of Practice were issued under the Magnuson-Moss

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[13] Oral presentations have been routinely held in TRR proceedings (*see* Appendix I to this report) even though the Rules of Practice establish only a presumption in favor of permitting oral presentations:

> The Commission shall review the rulemaking record to determine what form of rule, if any, it should promulgate. During this review process, the Commission may allow persons who have previously participated in the proceeding that such presentations would not significantly assist it in its deliberations. Presentation[s] shall be confined to information already in the rulemaking record. Requests to participate in an oral presentation must be received by the Commission no later than the close of the comment period under § 1.13(h). The identity of the participants and the format of such presentations will be announced thereafter.

16 C.F.R. § 1.13(i) (1980). This provision was not included in the original Magnuson-Moss Rules of Practice. *See* 40 Fed. Reg. 33969 (Aug. 13, 1975). It was added approximately two years after the original Rules went into effect, *see* 42 Fed. Reg. 60561 (Nov. 28, 1977).

[14] *See generally* 15 U.S.C. § 57a(d)(1) (1976); 16 C.F.R. § 1.14 (1980).

[15] 15 U.S.C. § 57a(e) (1976).

[16] *See* Data Appendix J to this report for time intervals in the posthearing stage of TRR proceedings.

Act, there was a running dispute between the Commission and some industry representatives on the question of whether Administrative Law Judges (ALJ's) should preside over the rulemaking hearings. The principal arguments in this dispute were straightforward, and not very persuasive. The trade regulation bar, and the American Bar Association in its report on the Magnuson-Moss Act, rested their case for ALJ's primarily on the ground that TRR proceedings were like industry-wide adjudications, and therefore there was an appearance of impropriety when the hearing officer did not have the formal autonomy of an Administrative Law Judge.[17] The FTC, in turn, took the position that rulemaking is significantly different from adjudication and that the use of ALJ's might further "judicialize" the proceedings.[18]

There seems to be little basis in fact for either concern. Both before and after the Presiding Officers were transferred from the Bureau of Consumer

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[17] The following comment of one participant in the Vocational Schools TRR proceeding exemplifies this argument:

> The Commission's first misstep was to designate a staff attorney in the prosecuting Bureau to oversee the proceeding. The Presiding Officer is thus a subordinate of, and at least theoretically accountable to, the Bureau Director—who is the chief proponent of the proposed rule. This is more than unfair: it may leave any final rule fatally vulnerable to attack. It would be much fairer, and easier . . . to use the Commission's Administrative Law Judges as presiding officers.
>
> Here I'd like quickly to say that in *Vocational Schools* it is quite fortunate that William Dixon, the Bureau's Special Assistant Director for Rulemaking, is Presiding Officer. Any of you who know the Commission will recognize him as one of the ablest, fairest and most unbiased staff officials at the Commission. Thus in this case it may be more the appearance of impropriety than the actuality with which we are concerned.

Wald Remarks, *supra* note 6, at 9–10; *see also* Report and Resolutions of the Section of Antitrust Law, *supra* note 6, at 14–15. For an example of allegations of actual impropriety, *see* Post-Record Comments of the Hearing Industries Ass'n in the Hearing Aids TRR Proceeding, Vol. IV at 477 ff (Feb. 19, 1979).

[18] There have actually been very few official pronouncements concerning the function of the presiding officer in Magnuson-Moss rulemaking. The most refined statement on the subject is the following rather terse statement made in response to comments on an early version of the Commission's rule governing *ex parte* communications in rulemaking:

> A few comments suggest that the Presiding Officer be insulated from staff and outsider communications because of his fact-finding role. The Presiding Officer's chief function is to preside, not to decide, and he is thus unlike an administrative law judge in an adjudication who makes an initial decision which can become final without futher action. The findings of the Presiding Officer are prepared merely to assist the Commission in its deliberations and in that sense he is part of the rulemaking staff to whom the Commission should have unrestricted access.

Statement Accompanying Publication of Final Rule on *Ex Parte Communications,* 42 Fed. Reg. 60561, 60562 (Nov. 28, 1977).

Protection to the General Counsel's Office,[19] they had a considerable degree of practical autonomy. In several years of relatively close and frequent contact with the Presiding Officers, the research staff of this study found no evidence that any FTC officals tried to pressure Presiding Officers into making a particular determination on a significant issue in a pending rulemaking proceeding. If anything, the Bureau leadership and the Commissioners tended to ignore the Presiding Officers rather than to pressure them. The Presiding Officers did generally have less experience in conducting administrative hearings than the average ALJ, and in a few instances a Presiding Officer displayed a lack of judicial temperament in the heat of the hearings. However, the unique procedures of Magnuson-Moss were a new experience for all concerned, and it is questionable whether a hearing officer's prior experience in adjudications would have produced markedly different, or better, rulings.[20] In addition to the procedural novelty of the proceedings, TRR hearings featured a variety of behavioral and economic evidence which was unlike the typical testimony and exhibits encountered in deceptive practices adjudications. It seems doubtful that the ALJ's would have been better equipped to deal with this technical evidence than the Presiding Officers. At the same time, it is difficult to see how ALJ's might have "judicialized" the hearings to a greater degree than the Presiding Officers did, under the rules and rulings issued by the Commission. It is also worth noting that the Commission assigned an ALJ to conduct the hearings in the Children's Advertising proceeding, where it made a major attempt to move toward less judicialized procedures.

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[19] In commenting on proposed legislation, which included amendments to the Magnuson-Moss Act, the Commision stated:

> Section 9 of the bill would require that presiding officers in rulemakings "not be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting function[s] of the Commission." In August 1978 the Commission transferred all of the presiding officers from the Bureau of Consumer Protection to the Office of the General Counsel. . . .
>
> The General Counsel exercises limited managerial supervision over the presiding officers. . . . While the Commission would hoave not objection to establishing the presiding officers as a separate unit within the agency, it believes that their present location in the General Counsel's Office and the present practice of the General Counsel meet the objectives of this provision.

Statement of the Federal Trade Commission on S. 1991 Submitted to the Hon. Wendell H. Ford, Chairman, Subcomm. on the Consumer, Senate Comm. on Commerce, Science and Transportation 29–30 (Nov. 13, 1979).

It is not altogether clear, however, that the transfer was intended to satisfy criticism of the position of Presiding Officers in the Bureau of Consumer Protection. The notice announcing the transfer states only that the change was made "as a matter of policy to enhance the management and work product of these programs." 43 Fed. Reg. 39083, 39084 (Sept. 1, 1978). The fact that most of the presiding officers who had completed their reports in pending proceedings were immediately reassigned to division "line" positions suggests that the transfer may have been designed to serve internal management objectives such as adjusting the size of the Presiding officer corps to fit the number of pending proceedings, or re-assigning quitely those Presiding Officers whose performance was considered substandard.

[20] It is worth noting that the Commission assigned an ALJ to conduct the hearings in the Children's Advertising proceeding, where it made a major attempt to move toward less judicialized procedures. A review of the motions and the Presiding Officer's responding orders reveals little difference in the handling of procedural matters compared to the earlier proceedings which were not conducted by ALJ's. Also, the prehearing conference in Children's Advertising was marked by shouting matches between the Presiding Officer and industry counsel—a fact which corroborates the impression that the contentiousness in many proceedings was less a function of the PO's temperament or skill, than of the strong resistance and adversary strategies of the rule opponents. *See* Ringel, *Uproar Surrounds Opening of Kid-Vid Hearings,* Legal Times of Washington, January 1, 1979, at 2; Observation Report of Prehearing Conference in Children's Advertising Proceeding, December 8, 1978.

The continuing debate over the status of the Presiding Officers may be based not so much on beliefs about their training or formal location in the organization as on differing perceptions about their proper function in the preceeding—the nature and amount of influence they ought to have in shaping the final rule. While there is little direct evidence that the policy-making officials within the FTC tried to minimize the influence of the Presiding Officers, several agency practices tended to have that effect.

1. The nature and content of the post-hearing report written by the Presiding Officer remained vague and undefined. The relevant Rules of Practice provision unchanged since its adoption in 1975,[21] defines the scope of the Presiding Officer's report as follows:

> After the close of the informal hearing, the presiding officer shall prepare a summary of the record, both written and oral, relating to the designated disputed issues of material fact which are necessary to resolve and make initial findings and conclusions as to these issues and other findings and conclusions as he sees fit.[22]

The language of this provision suggests a report far different from one prepared by a Presiding Officer whose "chief function is to preside, not to decide," as his role was described by the Commission late in 1977.[23] To rulemaking participants—and to the Presiding Officers who often spent a year or more preparing their reports[24]—this interpretation of the Presiding Officer's role must have come as a surprise.[25]

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[21] *See* 40 Fed. Reg. 33966 (Aug. 13, 1975).

[22] 16 C.F.R. § 1.13(f) (1980).

[23] *See* note 18, *supra*.

[24] *See* time intervals in the posthearing stage in Appendix J to this report.

[25] The ABA's Section of Antitrust Law recently commented on the ambiguity of the Presiding Officer's role:

> The presiding officer's current role in a rulemaking is ambiguous and generally misunderstood. The layout of the hearing room gives the unexperienced witness the impression that the presiding officer has a role similar to that of a judge in a formal adjudication. . . . However, the presiding officer is in reality an umpire with an unduly limited fact-finding function.
>
> The presiding officer makes a very restricted contribution to the outcome of a rule-

In retrospect, it is possible to identify several factors which may help explain these apparently conflicting statements regarding the role or purpose of the Presiding Officer's report. In the early days of Magnuson-Moss rulemaking, the Presiding Officers were expected to make detailed findings on a limited number of narrow questions—the "disputed issues of material fact which are necessary to resolve"—presumably after canvassing the whole documentary and oral record.[26] In practice, this became impossible for two reasons. First, the "disputed issue" concept proved unworkable, and the issues designated in the Final Notices became increasingly broad and policy-oriented.[27] Second, as the records swelled to enormous proportions, it became clear that a single Presiding Officer could not possibly review the entire record within a reasonable time. Faced with this dilemma, and not receiving any guidance from the agency leadership, the Presiding Officers tried as best they could to define their own roles.

As might be expected, report-writing styles varied substantially; some Presiding Officers, for example, came very close to recommending specific

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> making proceeding. In his report, he merely summarizes the record and makes impressionistic findings on the disputed issues. The staff can and often does ignore the findings of the presiding officer in preparing its report and recommendations to the Commission.

Report and Resolutions of the Section of Antitrust Law, American Bar Ass'n., *supra* note 6, at 14.

[26] Anticipating the end of hearings in several proceedings in June of 1976, the Acting Bureau Director circulated a memorandum setting forth guidelines for the writing of Presiding Officer and staff reports. The memorandum included the following remarks:

> I feel that presiding officers should confine their reports to those disputed issues that have been formally designated as such [and certain nonsubstantive matters discussed in the memorandum]. I have reached this conclusion not only because the Rules of Practice seem to require it but also because any other approach would cause delay and duplication in the rulemaking process. It would be wasteful of Bureau resources to have both staff attorneys and presiding officers prepare full and lengthy summaries in areas of the record outside those designated as disputed issues. . . .
>
> . . . [I]t is my view that the Rules of Practice contemplate a high degree of independence for presiding officers to make their summaries and findings as to *disputed issues* . . . These findings . . . will not be reviewable by the Bureau Director nor will they receive the approval, endorsement, or sanction of the Bureau Director.

Memorandum from Joan Z. Bernstein, Acting Director, Bureau of Consumer Protection to Assistant Directors, Presiding Officers and Staff Attorneys, June 18, 1976 at 1–2 (emphasis in original; document released Jan. 2, 1977 in response to a Freedom of Information Act request filed by a participant in the Protein Supplements TRR proceeding). The guidelines established by Acting Director Bernstein were suspended a short time later by her successor in that office. Memorandum from Margery Waxman Smith, Acting Director, Bureau of Consumer Protection, to Assistant Directors, Presiding Officers, Staff Attorneys, July 8, 1976 (also released in response to FOIA request).

[27] *See generally* Report to the Administrative Conference on Trade Regulation Rulemaking Procedures of the FTC, May 1979 [hereafter cited as "ACUS Phase I Report"], Chapter III at 36–47.

rule provisions, while others tended to confine themselves to commenting on factual issues. In general, however, the reports ranged rather broadly over all of the significant issues in the proceeding, and they were not based on the whole record. Rather, the Presiding Officers tended to give primary emphasis to hearing testimony—the part of the record that they had had the time and opportunity to master—while making forays into the documentary materials only when this was essential to dispose of an issue that they were analyzing.[28] Some Presiding Officers acknowledged forthrightly the limited nature of their record analysis. For example, the Chief Presiding Officer prefaced his report in the Vocational Schools TRR proceeding by stating:

> There are a number of things which this report does not undertake to do. First, it is not and does not pretend to be a complete analysis of the record. That is, I have not undertaken to examine and set forth all the arguments and evidence submitted by the different parties who have commented on this rule. This is the staff's job and I leave it up to them. I have analyzed the record only to the extent it seemed necessary to resolve the issue confronted.[29]

This approach may have been dictated by the practical constraints discussed below, but it made the reports much less useful than they could have been. In addition, the Presiding Officers' heavy reliance on the hearing transcripts may have helped to overemphasize this part of the process, and to downgrade the significance of the documentary record.

2. The Presiding Officers also had minimal support staffs, comprised of secretaries and a few paralegals and law clerks who had to be shared among approximately ten Presiding Officers in twenty proceedings.[30] In a

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[28] There were a few exceptions to this general tendency to rely mostly on the hearing portion of the record. *See, e.g.*, the Report of the Presiding Officer in the Protein Supplement Proceeding (June 15, 1978).

[29] Report of the Presiding Officer in the Vocational Schools Proceeding 9 (Sept. 10, 1976); *see also* Report of the Presiding Officer in the Hearing Aids Proceeding 37 (Aug. 1, 1977) for a similar statement. Statements by Presiding Officers in reports issued in later proceedings emphasized that, while their reports did not contain an exhaustive analysis of all the documents in the record, the Presiding Officer had in fact reviewed all record material. *See, e.g.*, Report of the Presiding Officer in the OTC Drugs Proceeding 19-20 (Oct. 1978); Report of the Presiding Officer in the Mobile Homes Proceeding 17 (undated).

[30] One member of the private bar publicly blasted the FTC for failing to provide adequate support for the Presiding Officers:

> As a further aside, I'd like to add a personal view that I find the Commission's almost wanton neglect of its hearing officers quite incomprehensible. A local trial judge has his own clerk, a federal district judge sitting in major litigation has two or more law clerks, and the capability of calling on expert assistance where necessary. But the Federal Trade Commission Administrative Law Judges, and presiding officers, often sitting on cases as complex as any district court antitrust litigation, have, as I understand it, only one or two

few instances, Presiding Officers had some access to computerized record indices produced by the rulemaking staffs, but for the most part they had to try to master the rulemaking records on their own. Some Presiding Officers in the early proceedings attempted to enlist the aid of the group representatives by requesting the submission of proposed findings and conclusions. This approach was promptly vetoed by the Chief Presiding Officer with the apparent concurrence of the Acting Bureau Director.[31] A few of the Presiding Officers

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> assistants from which the entire corps can draw. And, historically, they've never had it any better.
>
> In *Vocational School[s],* as mammoth a case as recent history records—with a record of over 100,000 pages—the Presiding Officer had only the comfort of his own considerable talents, energies, common sense, good humor and one paralegal. If the Commission wanted to improve the quality of the justice which it dispenses, perhaps the single simplest, most dramatic and, apparently least obvious step it could take would be to give one—just one—experienced legal assistant to each of its Administrative Law Judges and Presiding Officers. And if it wanted to bring truly improved management techniques to its case administration, it could—without, I suspect, even rippling its swollen budget—set up a corps of economists, statisticians, accountants, and scientists, independent of the operating bureaus, to serve on assignment in particular matters.

Wald Remarks, *supra* note 6, at 10–11.

[31] One reason for the ban on proposed findings may be the Chief Presiding Officer's belief that this additional procedural step could have delayed the proceeding, particularly because the rulemaking staff would have had to divert time from its report-writing to submit proposed findings. Interview with William Dixon, Special Assistant Director for Rulemaking, Sept. 28, 1978. This policy of prohibiting proposed findings was challenged in the Protein Supplements proceeding, where a participant petitioned the Presiding Officer to certify the issue to the Commission. The petition stated in part:

> We believe it is unfair and unsound to require that interested parties who have actively and seriously participated in the making of the record . . . be required to sit idly be while a presiding officer makes recommendations to the Commission . . . This is particularly so in the instant proceeding where we are dealing with a matter which, we respectfully submit, is not within any particular expertise of any given member or employee of the Commission. [W]ell-reasoned proposed findings of fact and conclusions of law will not only permit the parties to fulfill their proper role in this trade regulation proceeding, but will also facilitate the functions of the presiding officer in drawing together the voluminous transcript, the multitude of pages, and the widespread issues in this proceeding.

Petition for Certification of Ruling to Commission by Attorneys for the National Nutritional Foods Ass'n, Oct. 12, 1976, at 1-2.

The Presiding Officer denied the petition, stating that he did not consider the issue to involve a controlling question of law or policy which would be properly certifiable under the Rules of Practice. Nevertheless, he expressed personal agreement with the views of the petitioners.

> As you know, I am in general agreement with your position on the merits of this issue. In that regard I have endeavored to secure reconsideration at the Bureau level of the policy barring such filings. Such efforts have been unsuccessful to date.

Letter from Christopher W. Keller, Presiding Officer, to Robert Ullman, Esq., Feb. 22, 1977.

had had substantial experience in rulemaking, but as a group they generally lacked the technical training and background needed to deal with the scientific and behavioral science evidence present in most proceedings. To the extent that this kind of expertise existed within the agency, the Presiding Officers apparently did not have access to it. In short, however, the Presiding Officers' decision-making and report-writing responsibilities were defined, they were not given the tools to perform that job adequately.

3. After the conclusion of the oral hearings, the Presiding Officers were rapidly phased out of the proceedings and had no substantive role in the shaping of the final rule. They were also relieved of procedural responsibilities soon after the end of hearings, although the exact point at which this happened was unclear and may have been subject to an unannounced policy change. Upon receiving a motion from a participant in the Protein Supplements proceeding in September of 1978, the Presiding Officer responded:

> Although there is under consideration a proposal to permit presiding officers to handle all procedural developments throughout a rulemaking proceeding, the present practice dictates that once a presiding officer has filed his report he ceases to have any involvement, procedural or otherwise, with the matter . . . .
>
> I have forwarded your motion to the Secretary of the Commission with instruction to immediately place the original on the public record . . . and to route the copies to the person who heads the staff working on the proposed rule.[32]

Roughly one year later, when the Presiding Officer in the Mobile Homes proceeding faced a similar situation, he responded that "all motions or petitions are to be forwarded to the Presiding Officer for consideration until the end of the post-record comment period provided for in the Commission's Rules of Practice."[33] Thus, it appears that Presiding Officers are now authorized to act on procedural matters through the post-record comment period. The important point, though, is that they still are not consulted on substantive issues or asked to participate in the Commission's consideration of the rule.

The Presiding Officers' relative lack of influence during the final stages of the process may have had some apparent advantages from the Commission's and Bureau Director's perspectives. In practice, the Presiding Officers stood at least partly outside the normal chain of command, perhaps because the agency leadership was wary of giving substance to the bar's complaints about the Presiding Officer's lack of independence. Thus, the

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[32] Letter from Christopher W. Keller, Presiding Officer, to Richard J. Leighton, Esq., Sept. 27, 1978; *see also* Memorandum from Acting Director Bernsetin, *supra* note 26, at 6.

[33] Letter from Raymond L. Rhine, Presiding Officer, to Michael J. Fremuth, Esq., Nov. 20, 1979.

Presiding Officer might not be as fully informed of or as responsive to current agency policy as the rulemaking staff attorneys normally would be. Also, any variances between the Presiding Officer and staff reports on important issues would provide ammunition for rule opponents, particularly on judicial review.[34] If the Presiding Officer's report was as comprehensive and well-documented as the staff's, it would be more difficult for the agency to justify a decision rejecting the Presiding Officer's conclusions. These same considerations would tend to make rule-opponents favor an independent Presiding Officer whose role and duties gave him considerable influence over the final decision.[34a] In many respects, the Presiding Officers became a focal point for the tensions arising from the statute's underlying ambivlence as to whether trade regulation rulemaking should be soley a reasoned decision-making process, with the result dictated by an impartial evaluation of record evidence, or whether it should be a more openly policy-oriented process in which the Commissioners had the latitude to enact their own policy preferences, to seek compromise solutions, or to respond to the desires of constituency groups and individual members of Congress. A more substantial basis for the rule opponents' concern may have been their belief that the rulemaking staffs would unfairly characterize the record and issues in *ex parte* communications with the Commissioners. As discussed more fully in the following section, certain characteristics of Magnuson-Moss rulemaking suggest that there may be some basis for these concerns.

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[34] This point was raised on review of the Vocational Schools Rule. For example, one petitioner complained:

> Several of the Presiding Officer's findings and conclusions were opposed to various provisions of the proposed rule. . . .
>
> The staff report, rather than the Presiding Officer's report, became the major written source of information and recommendations for the Commission, as a simple glance at the citations to the Commission's Statement of Basis and Purpose demonstrates. The Statement cites continuously to the staff report, and comparatively seldom to the Presiding Officer's.

Brief of Katharine Gibbs School in Katharine Gibbs School, Inc. v. F.T.C., 612 F.2d 658 (2d Cir. 1979), *petition for rehearing* en banc *denied,* ______ F.2d (1980). Similarly, on judicial review of the Ophthalmic Goods TRR, the court relied on the Acting Bureau Director's memorandum questioning record support for some rule provisions in finding that there was inadequate evidence to sustain the major parts of the rule. American Optometric Ass'n v. FTC, No. 78-1461 (D.C. Cir. Feb. 6, 1980) (Slip op. at 30-35).

[34a] The ABA Section of Antitrust Law's Report, *supra* note 6, at 16-17, recommends that ALJ's be designated as Presiding Officers in TRR proceedings, and given additional decision-making responsibility:

> Presiding Officers should . . . have responsibility to render an initial decision based on their weighing of the evidence and application of the law and the mission to exert strong control in the direction and conduct of the proceedings.
>
> . . . . .
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> . . . [I]f the presiding officer is given the responsibility to define the factual propositions which must be proven to support a rule and the responsibility to render findings as to what facts have been proven, . . . this . . . will introduce much more discipline and order into the proceedings. It will have the effect of requiring the Presiding Officer to take much more substantive control of the proceedings, including formal or informal assignments of burden of proof and some setting of standards of relevance for admission of evidence. . . .
>
> Admittedly, these suggestions constitute "judicialization" of the proceeding. They may well, however, cure a great many of the problems which the Administrative Conference found to plague the current rulemaking proceedings.

B. The Rulemaking Staff

With the Presiding Officers playing a minimal role in the post-hearing stages, the influence of the staff was correspondingly enhanced. In general, the staff had more resources than all but the largest and best financed outside participants. The rulemaking staff usually consisted of a team of attorneys who could divide up the tasks like report-writing or preparing rebuttal submissions, and they often had access to computerized litigation support systems. Perhaps the most important advantage for the staff was their familiarity with the entire rulemaking record, at least in those situations where there had been some continuity in staff assignments throughout the course of proceeding.[35]

The problems surrounding the staff's role involved two related issues. The first concerned the staff's preferential access to the Commission, especially during the final stages of the process when the Commissioners were focusing upon specific rule provisions. In the wake of the *Home Box Office* decision,[36] the FTC limited outside parties' freedom to engage in *ex parte* contacts with Commissioners or their personal assistants.[37] However, the agency consistently refused to adopt similar separation-of-functions requirements prohibiting off-the-record contacts between the Commissioners' offices and the staff attorneys assigned to the rule. There was a very practical basis for this distinction, arising from the enormous size of many rulemaking records. The Commissioners and their personal assistants could not realistically expect to master a large TRR record without some assistance or guidance from individuals who had developed a working knowledge of the issues and evidence over the years it took to bring a rule to the Commission for final action.[38] To some extent, the post-record comments helped to illuminate gaps or weaknesses, in the evidence, but they were not always sufficient to give the decision-makers a real feeling for the state of the record. Moreover, they were of no help at all when, as often happened, the Commission wanted to consider an alternative rule formulation that had not been specifically addressed by the commenters. In this situation, the Commission needed someone to turn to for guidance on whether the record was adequate to support a propsed rule modification. The precise nature, frequency, and content of these contacts could not be observed in this study,

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[35] The high rate of turnover among staff attorneys has been a longstanding problem for the FTC. *See, e.g.*, E. Cox, R. Fellmeth and J. Schulz, "The Nader Report" On the Federal Trade Commission 155 (1969) ("Within four years 80 percent of the new lawyers leave the FTC."). A study conducted in 1976 by Meredith Associates, Inc. found that of attorneys leaving the agency within an 18-month study period, 81% had four years tenure or less, and 62% had three years tenure or less. Meredith Associates, Inc., Report on Attorney Recruitment, Selection and Retention at the FTC 13 (July 15, 1976). However, the turnover rate for the Bureau of Consumer Protection was less than the rate for the agency as a whole, with 72% having four years tenure or less. An attorney survey also revealed that 89% of all FTC attorneys who joined the FTC in the period 1972-1975 expected to leave the agency in two years or less. *Id.* at 14. Nearly 40% of all Gs-16's and above planned to leave in one year or less. *Id.*

[36] Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977); *cf.* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

[37] On September 1, 1977, the Commission promulgated a rule prohibiting all *ex parte* communications between interested persons and Commissioners or their personal staffs, commencing with publication of the notice of rulemaking. 42 Fed. Reg. 43973-74. Although the rule took effect upon publication, the Commission did solicit comment on the new *ex parte*

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communications rule. In a subsequent notice, the Commission defended its decision to adhere to a total ban:

> The Commission adopted its prohibition against outside communications in order to insure that its extensive comment procedures would not become irrelevant and to prevent the appearance of special access to the ultimate decisionmakers. The Commission was also concerned with the problem of allowing other interested persons to comment on communications to Commissioners, which would require continually reopening the record with resulting delays in reviewing the record and deciding whether to promulgate a rule.

42 Fed. Reg. 60561, 60562 (Nov. 28, 1977). The total ban on *ex parte* communications was adopted over the dissent of Commissioner Dole and the serious misgivings, if not official opposition, of Commissioner Dixon. Observation Report of Commission Open Meeting on Oct. 28, 1977. Therefore, sentiment existed on the Commission for a less stringent rule, and the Commission did reconsider the matter and publish a revised "interim rule" on March 19, 1979. 44 Fed. Reg. 16366. The interim rule adopted the approach of ACUS Recommendation 77-3, 1 C.F.R. § 305.77-3, which had been advocated by Commissioner Dole. Following that approach, "outside" *ex parte* communications are permitted until the close of the post-record comment period, provided that the communications are placed in the rulemaking record. *Id.* Oral communications must be transcribed verbatim. *Id.*

[38] The Commission admitted this practical aspect of its decision to not limit staff communications when it responded to comments on the initial *ex parte* communications rule:

> [T]he Commission does not believe that staff communications should be banned. Staff communications serve a positive function, by allowing Commissioners, in review what are often massive record that have not been shaped by a clear-cut adversarial process, to receive assistance from those persons in the Commission who are most familiar with the record. To seek assistance from staff members who have not participated in the rulemaking proceeding, as some comments suggest, would result in a misallocation of resources by ignoring the people best-suited to aid the Commission.

42 Fed. Reg. 60561, 60562 (Nov. 28, 1977).

but, judging from the interchanges between Commissioners and staff at the public "markup" meetings on TRR's, they were probably significant.

Objections to the staff's "preferential access" were fed by rule opponents' perceptions that the staff attorneys were their adversaries in every sense of the word. As one member of the trade regulation bar put it:

> We have heard the Commission staff respond to the objection that the Commission has failed to insulate itself from staff influence with the chant that "this is rulemaking not adjudication" . . . . That is a technicality and a cop-out. While these proceedings may not be adjudications within the classic APA definitions, they are a new hybrid with far more the character of an adversary proceeding than the classic legislative-type rulemaking proceeding. The Bureau staff assigned to each of these proceedings are fervent, effective, often rabid advocates of the proposed rule both publicly and privately.[39]

This concern for the staff's preferential access and advocacy role was shared by some representatives of consumer interests as well. For example, the Institute for Public Interest Representation argued that staff communications to the Commissioners should be prohibited whenever rulemaking proceedings involved disputed issues of material fact:

> Under current practice, the staff proposing (prosecuting) a new rule becomes in many respects merely another interested participant in the proceedings—albeit a powerful one. Since it has proposed the rule, the staff quite understandably assumes an advocate's position, seeking to develop the strongest case possible to persuade the decisionmakers of the accuracy of its perception of the facts and the correctness of its proposal.
>
> The Institute does not here dispute the propriety of the staff's assumption of this role. If, however, other parties are to be restricted in their communications with the decision-makers, so should be the staff. If the public should know the facts which have led to Commission action, it should make no difference who raises those facts for consideration.[40]

The Commission's position was that the staff attorneys were not advocates in the same sense that complaint counsel in a deceptive practices adjudication may be. Rather, the rulemaking staffs were charged with the responsibility for building a balanced record in the proceeding. The clearest official articulation of the Commission's view of staff's role is its response to the public comments on its *ex parte* communications ban:

> The comparison of rulemaking with adjudication is not appropriate. The distinction in staff roles between adjudication and rulemaking has long been recognized . . . . While the staff in an adjudication is engaged in a prosecutorial activity, rulemaking staff are responsible

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[39] Wald Remarks, *supra* note 6, at 14.

[40] Comment of Institute for Public Interest Representation, Georgetown University Law Center 10 (Oct. 17, 1977).

> for assisting the Commission in its quasi-legislative role. The rulemaking staff has the responsibility of seeing that a complete record is established.[41]

There were several difficulties with this approach. For one thing, it was not made clear, either in official documents or through informal channels, what the "balanced record" obligation meant in particular situations. For example, if the target industry was vigorously opposing a proposed rule but the pro-rule position was only weakly represented, was it proper for staff to "tilt" toward the pro-rule position in order to bring some global "balance" to the proceeding? Or should staff rigorously maintain a position of neutrality and devote equal effort to the presentation of evidence both for and against the proposed rule? In defending the conduct of the staff on review of the Vocational Schools TRR, the Commission argued that the former, or "tilt," approach was proper in that proceeding.[42]

A more basic difficulty was the fact that the personalities and circumstances of the staff attorneys created some real disincentives for them to seek either kind of balance in the proceedings. During the period covered by this study, the staff attorneys in the Bureau of Consumer Protection were generally both inexperienced in litigation and lacking in technical training to deal with the economic and behavioral science materials that were important in many proceedings. The intellectual discipline resulting from training in these technical fields might have provided some check on the staff attorneys' natural policy inclinations. At the hearings, the staff crossed swords with seasoned veterans of the trade regulation bar, who sought to protect their clients' interests by using all of the procedural and substantive leverage that the statute and Rules of Practice allowed. The general atmosphere of the hearings and the particular dynamic of cross-examination permitted, if not encouraged, this adversary behavior. In this setting, some polarizaton of the staff attitudes would have been very hard to avoid. Another contributing factor may have been the personalities and values of the individual staff attorneys. When the FTC was "revitalized" in the early 1970's following the Nader and ABA reports, the agency began to recruit a cadre of young lawyers who were aggressively, if not militantly, pro-consumer.[43] These staff attorneys usually had conducted industry-wide investigations lasting for months or years; and, if these investigations were sometimes lacking in rigor or methodological sophistication, they at least gave the staff lawyers ample opportunity to see some serious abuses first-hand. Thus, it is hardly surprising that the staff would enter the proceedings with a firm belief that strong remedial action was necessary.

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[41] Response to Comments on the *Ex Parte* Communications rule, *supra* note 38, at 60562.

[42] Breif for the Federal Trade Commission in Katharine Gibbs School, Inc., v. FTC, *supra* note 34, 15 127–28:

> Petitioners do not indicate any in which the rulemaking record is inadequate, nor any time when the Commission did not get a complete picture of the arguments for and against the proposed rule. They argue, rather, that the staff acted improperly by primarily introducing information in support of the rule and by not obtaining written statements from nor calling as witnesses, all persons, such as former salesmen, with whom they discussed the proposed rule. Staff's encouragement of participation by proponents of the proposed rule was perfectly consistent with the fulfillment of its obligation to assure a complete record for the Commission. The staff correctly perceived—as evidenced by the record—that industry members and their representatives would participate actively in the proceeding and would introduce evidence generally in opposition to the proposed regulation. Accordingly, in order to assure that a complete record was presented to the Commission, the staff's focus on eliciting information in the record regarding unfair or deceptive practices was appropriate.

Against this background, the FTC's formal definition of the staff role was unrealistic at best. The tension between the staff's investigative and advisory responsibilities on the one hand, and their advocacy functions on the other, was evident within the agency during the initial implementation of the Magnuson-Moss Act. In June of 1976, the Acting Bureau Director tried to separate the two "hats" staff would wear in preparing their final report:

> The language in the Rules of Practice is direct and largely unambiguous. The staff's report should summarize and synthesize the factual matter in the record to provide the Commission with an objective factual picture of the evidence produced during the course of the proceedings. Moreover, the staff bears the responsibility for writing the words of the final rule they recommend that the Commission promulgate.[44]
>
> . . . . .
>
> . . . I believe that all staff reports should follow a fairly uniform format that segregates the staff's summary of the evidence in the record from the staff's views, conclusions, opinions, and recommendations. It is the staff's responsibility to produce for the Commission a

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[43] The ABA Report encouraged this development:

> There are of course a number of able, dedicated and hardworking people in senior and other staff positions throughout the agency. With the appointment of new people to some senior staff positions and an influx of young lawyers and other professionals attracted by the prospect of participating in new programs, particularly in the area of consumer protection, we think this agency could begin to realize its potential.

Report of the ABA Commission to Study the Federal Trade Commission 33 (Sept. 15, 1969). *See also* Chapter 21, Republicans Revitalize the Trade Commission, in James M. Graham and Victor Kramer's study, Appointments to the Regulatory Agencies: The Federal Communications Commission and the Federal Trade Commisson (1949-1974), Committee Print of the Senate Comm. on Commerce, 94th Cong., 2d Sess. 333-48 (1976). The trend was continued, if not accelerated, when Michael Pertschuk became Chairman of the FTC. In an interview conducted shortly after his appointment, Pertschuk stated:

> I really set out, as the first priority here, to recruit . . . What I basically did was to look for people with two sets of qualifications—unquestioned professional qualifications and a strong history of public interest involvement and advocacy.

Cohen and Demokovich, *Pertschuk - Moving Quickly to Cast the FTC in His Own Mold,* National Journal, June 4, 1977, at 853, 855.

[44] Bernstein Memorandum, *supra* note 26, at 3.

> report that will allow the Commission to see and evaluate the evidence that was introduced in the oral and written record. This responsibility requires that the staff divorce its own views on how the evidence should be interpreted . . . from its objective rehearsal of the evidence.[45]

Even this minimal guidance was rescinded,[46] and the staff attorneys were generally left to define their own roles. Some of them tried to separate their advocacy from their record-building and record-reviewing duties.[47] Others did not, and in the Hearings Aids TRR proceeding, the Commissioners had to admit that the final staff report could not be trusted due to the obvious bias of the report-writers.[48]

The Hearings Aids experience highlights the practical basis for many participants' concern over the staff's preferential access to the Commissioners, both in the posthearing reports and in private *ex parte* communications. As discussed below, the content of the rulemaking records did not always shape or influence the final decision on a proposed rule. When the state of the record was an issue, however, the outcome usually did not turn on a few items of evidence; what was important was the cumulative impression arising from a large number of witness statements, rebuttal submissions, comments, investigative documents, and the like. With the huge records and the limited time and energy that the Commissioners had to master the issues, they were heavily dependent upon those who were closer to the proceedings—primarily the staff— to summarize and characterize the evidence. Thus, the principal fear of the rule opponents was not so much the classic *ex parte* concern that staff would expose the Commissioners to new, non-record evidence; rather, the concern was that staff advocates would distort the decision-makers' impressions of the weight and credibility of material that was already available on the record.[49]

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[45] *Id.* at 4.

[46] *See* note 26 *supra.*

[47] For example, the Care Labeling staff report contains the following statement:

> From the beginning, the Commission staff perceived its role in this proceeding as composed of two elements: one, as advocates to support the proposed rule; two, as Commission employees to ensure a balanced, adequate record replete with evidence on both sides of all issues. As this proposal directly affects a large number of industries as well as the consuming public, staff made a conscious effort to ensure that their views were included in the record in a balanced fashion.

Final Recommendations of the Staff in the Care Labeling Proceeding 7 (May 1978). The Care Labeling TRR amendment proceeding was the least adversarial of the seven "core" proceedings studied.

[48] Observation Report of Commission Meeting on Oct. 24, 1979. The Commissioners' main problem was Appendix D of the staff report, in which the staff systematically assessed the credibility of most witnesses and some persons who submitted written comments. The staff consistently found deficiencies in the competence, forthrightness or ethical sensitivity of persons opposing the rule, while uncritically accepting the credentials and credibility of persons favoring the proposal.

In any event, considering the procedures and incentives under which they operated, it is not surprising that the staff attorneys often became advocates instead of investigators. Thus, it is a bit unfair to charge the staff with waging a "vendetta" against industry.[50]" They were not really engaging in behavior that was improper or unsanctioned under established agency norms; rather, the staff lawyes were reacting to incentives and expectations that were created by Commission policy and by the statute itself. This suggests that special management and supervisory policies may be necessary if an agency wants to preserve some measure of staff neutrality in a controversial hybrid rulemaking proceeding. For example, clearly articulated standards defining the staff's obligation to build the record and setting limits on their advocacy might be necessary, and the agency's incentive structure should reward those who adhere to those standards. Even if the FTC had taken these steps, however, it is not clear that they would have been effective. The adversary postures taken and tactics employed by the other participants would have made it difficult for the staff to refrain from responding in kind. Moreover when the proceeding is sharply contested and judicial review will be based on close scrutiny of the record, it can be dangerous for rule-supporters to admit any doubts or weaknesses in their position. Thus, it may be that this type of hybrid rulemaking process inevitably heightens the adversary element of rulemaking. When that happens in a large, complex proceeding, the agency may face the dilemma of either cutting off the Commissioners from staff assistance, which may impair the quality and efficiency of the decision, or of creating the risk of actual or apparent unfairness to rule opponents.

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[49] Memorandum in Support of Petition by the Manufactured Housing Institute (MHI) to Prohibit *Ex Parte* Communications between the Commission and Staff in the Mobile Homes Proceeding 7 (Nov. 6, 1979):

> In order to get to the merits of the disputed issues, the Commissioners and their advisors will turn . . . to the staff familiar with the record for input regarding the nature and amount of evidence on a particular factual proposition or regarding the significant areas of conflict in a policy dispute. Such secret input puts the the staff in a crucial position to influence the flow of facts to and the molding of issues before the Commission . . .

See also id. at 9-10:

> The Commission's second attempted justification [is that the Rules of Practice] require that the Commission not consider any information not reflected in the final rulemaking record. MHI cannot accept that justification because, especially with regard to the over 500,000 page mobile home rulemaking record, the main problem with staff *ex parte* contacts is the possibility of biased summarizing of current evidence or biased molding of issues rather than the possible presentation of new evidence. Indeed, in the case of the instant rulemaking proceeding, there already exists in the record some evidence for practically every viewpoint on every conceivable issue.

However, it should be noted that arguments similar to these did not persuade the Second Circuit panel reviewing the Vocational Schools TRR. The majority concluded that "[p]etitioners' complaints of *ex parte* communications between the Commission and an allegedly biased staff do not disclose a lack of due process and are more properly addressed to Congress." Katharine Gibbs School, Inc. v F.T.C. *supra* note 34, at 670.

[50] In testifying before the Subcomm. on the Consumer of the Senate Commerce Committee, Chairman Pertschuk reportedly conceded that some members of the rulemaking staffs (giving as examples the Funerals, Hearing Aids and Vocational Schools Proceedings) had carried out "vendettas" against industries. *The Washington Post* October 6, 1979, at F. 1.

C. The FTC's Middle Management

Another important group of actors were the mid-level FTC officials who had responsibility for managing and supervising the conduct of TRR proceedings—the Director of the Bureau of Consumer Protection and the Assistant Directors who headed the divisions where the TRR's originated. There was a fairly substantial turnover in these positions during the period covered by this study[51] and in some respects there was a corresponding lack of continuity in the supervision policy or management emphasis in TRR proceedings. The middle managers had two basic and potentially conflicting objectives: moving the TRR proceedings expeditiously through the "pipeline" toward final action, and maintaining quality control over the evidence, arguments, theories, and rule provisions produced by the rulemaking staffs. Achieving these objectives without undermining the staff attorneys' morale was a difficult and sensitive task, compounded by the fact that most middle management officials carried a heavy workload. This combination of factors—turnover, workload, the conflicting pressures of the managerial role—tended to put the middle level officials in the posture of reacting to crises rather than trying to anticipate and prevent problems. Also, the changing political climate and the turnover at the Commission level dictated a shift in the agency's management emphasis. In the early years of Magnuson-Moss rulemaking, the managers' top priority was on avoiding delays and moving the rules through the process quickly. Later, as the political and substantive problems with the proposed rules became apparent, there was increased concern for the quality of data and argument used to support particular rule provisions. However, by the time that the Bureau Director and the Commissioners began paring back rule provisions which were not adequately supported or within the bounds of acceptable policy, much of the damage had already been done.[52]

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[51] The exact rate of turnover is difficult to determine because a major reorganization of the Bureau of Consumer Protection took place following the swearing-in of Chairman Pertschuk on April 21, 1977.

[52] In the following statement before a congressional oversight committee, Chairman Pertschuk attempted to direct attention to the final action of the Commission in cutting back

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With the benefit of hindsight, it is possible to make several observations about the need for strong management in hybrid rulemaking proceedings. One point suggested by this study is that more and earlier attention at the Commission and Bureau Director levels to the details of managing large, complex, and controversial rulemaking proceedings is important. In particular, the desirability of establishing and communicating to staff clear performance or quality control standards seems obvious. This latter issue, however, is not just a question of management strategy; it also involves the agency leadership's basic view or philosophy of hybrid rulemaking. Throughout the period covered by this study, the FTC took the position that trade regulation rulemaking under the Magnuson-Moss Act was still basically an investigative exercise similar to notice-and-comment rulemaking, rather than a judicialized fact-testing and theory-testing process.[53] Under this investigative approach, it is appropriate and perhaps

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the final TRR's rather than to the broad rules that had originally been proposed:

> Yes, our procedures have been criticized; the objectivity and judgment of our junior staff in some of the proceedings has been questioned; the breadth or wisdom of rules *proposed* or remedies *considered* has been challenged. Surely these are issues which must be addressed.
>
> But in the last analysis the Commission's performance must be judged on the basis of the soundness and the quality of the final rules which ultimately emerge from rulemaking. And here we submit that the record demonstrates that the Commission is carrying out the intent of Congress with judiciousness and restraint. This is evidenced by the fact that most of the criticism you have heard these past few days has not been directed at Commission action in promulgating final rules, but at proposed rules and the intermediate stages of rulemaking.
>
> . . . . .
>
> The record will show . . . that the members of this Commission have consistently sought and received from the staff exhaustive and balanced analysis of the record, that we have read and heeded the testimony and comments and listened to the oral advocacy of businesses affected by proposed rules, and that we have exercised individual independent judgment based upon that analysis.

Prepared Statement of Michael Pertschuk, Chairman, Federal Trade Commission, Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science and Transportation, Oct. 5, 1979, at 7-8 (emphasis in original).

[53] *See* Report of the FTC on Rulemaking Under the Magnuson-Moss Warranty—FTC Improvement Act [hereafter cited as "FTC Report to Congress on Magnuson-Moss Rulemaking"], *supra* note 12, at 23-28, for a statement of the FTC's view of Magnuson-Moss rulemaking as primarily an investigative or educational process, rather than a fact-testing process. The following statement of the Director of the FTC's Bureau of Consumer Protection also reflects this view of rulemaking as a process designed to explore multiple alternatives, rather than one which is designed to test the accuracy of a particular proposal:

> The rulemaking process, when it works properly, is an exploration of the forces that have created a perceived marketplace problem and of proposals for change that may modify current conditions in a way that will produce a defined benefit. The steps in each rulemaking are the same. The Commission preliminarily identifies an area of probable market dysfunction. It engages in a determination of whether the problem does, in fact,

desirable to start the public proceedings with a wide range of theories and proposed rule provisions, and with relatively limited factual support. The need for tight theories and full record support would not arise until the end stages of the process. The FTC's experience suggests that this approach can have substantial costs. As discussed more fully below, the hybrid rulemaking procedures can contribute to the agency's problems by creating expectations among outside participants that they are entitled to a fact-testing, judicialized process, and by making it difficult for the agency to change the focus of the rule in midstream or otherwise respond when a proposed rule generates intense opposition.

D. The Commissioners

One of the most notable aspects of the Commissioner's role in trade regulation rulemaking is their lack of involvement until the very last stage of the process. From the time the Initial Notice of Proposed Rulemaking is issued until the Commission meets to hear oral presentations—a period of several years—the Commissioners have virtually no formal opportunities to review the progress of a rule or to re-evaluate it in light of evidence and argument produced by outside participants. The principal ways in which the Commissioners might have an opportunity to review the status of a TRR under the Rules of Practice, would be appeals from Presiding Officers' rulings and approval of regular budget reports.[54] However, these decisions

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> exist and, if so, what the causes of that problem may be. Having identified casual factors, the Commission is then in a position to specify the resultant change it desires from any rule it might promulgate and proposals for reaching that goal.
>
> A "successful" rulemaking is not one which, up to [the point of final Commission action], reaches any particular result. Rather, the Commission should have before it a factual record that clearly supports a number of alternative approaches to a documented problem and predicts with some measure of confidence the expected impact of each approach. With such a record, the Commission can then undertake the complex admixture of law and policy to formulate its final rule and fulfill its statutory obligation to act in the public interest.

Memorandum to Commission from Albert H. Kramer, Director, Bureau of Consumer Protection, Concerning Final Action in the Used Cars TRR Proceeding, July 26, 1979, at 1.

[54] The FTC's Rules of Practice generally provide that rulings of the Presiding Officer cannot be appealed to the Commission on an interlocutory basis "unless the presiding officer certifies in writing to the Commission that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate review of the ruling may materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy." 16 C.F.R. § 1.13(c)(2) (1980). One exception to this general rule is contained in the same section. The Commissioners have a formal opportunity to become involved in the substance of a developing rule when an interested person petitions for review of the Presiding Officer's designation of disputed issues to be resolved through cross-examination, rebuttal and compulsory process. However, the Rules of Practice provide that the Commission has the discretion to decline review. *Id.* After the initial experience with

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typically involve procedural or managerial questions rather than substantive consideration of the rule itself, and there is little evidence that individual Commissioners took the initiative to become involved in the substantive issues arising from a proposed rule during the public proceedings.

The Commissioners' relative isolation from the evolving issues in TRR proceedings had several undesirable consequences. In some measure, it probably undermined the quality of decision. On the other hand, neither the staff nor the outside participants had any regular feedback regarding the Commissioners' perceptions or positions on key issues in the proceeding. As a result, the record might be inadequate to illuminate matters that the Commissioners considered important, and the participants would not know where they should direct their efforts. On the other hand, the Commissioners' thinking would not evolve during the course of the proceeding. Many of the TRR's presented difficult issues of fact, law and policy. Mastering these questions requires not only information, but also sufficient time to absorb it. Judging from the oral presentations and public Commission meetings, the relatively compressed timetable of Commission involvement at the final stages did not always afford the Commissioners enough time to develop a full grasp of the issues raised by a pending rule.[55] The problem may have been compounded by relatively high turnover at the Commission level. In several instances, only one of the Commissioners who met to vote on a final rule had been in office when the proceeding was initiated.[56]

A second consequence of the Commissioners' lack of involvement during most of the public proceedings was that it created at least the appearance of unresponsiveness to valid concerns and objections. Staff did not have authority to modify a rule on its own initiative during the course of the proceedings. In theory, the staff attorneys or the Bureau Director could have proposed a modification or cutback to the Commission during or after

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designated issue review in the Vocational Schools TRR proceeding (*see* ACUS Phase I Report, Chapter III, at 35), the Commissioners rarely granted such petitions. (*See* Data Appendix to the Phase I Report, Item 18.) The Commission's "hands-off" approach to designated issue review during the period when most petitions were filed is understandable. Most of the petitions were filed relatively early in the implementation of the Magnuson-Moss Act, and at that time the Commission had no basis for assuming that the benefits of substantive involvement would justify the inevitable delay. Moreover, substantive involvement by the Commissioners might have been viewed as a subversion of the Presiding Officer's authority.

[55] As Appendix J to this report shows, once the Bureau Director's recommendations were forwarded to the Commission, oral presentations and the first Commission meeting to consider final action followed in quick succession.

[56] By the end of 1979, Paul Rand Dixon was the only sitting Commissioner who was a member of the Federal Trade Commission when the first sixteen TRR's were proposed. The next senior commissioner, David Clanton, began his tenure in August of 1976, four months after the Initial Notice of the OTC-Antacids TRR proceeding—the sixteenth—was published.

the hearings, but in practice this was seldom done,[57] and there is no indication that the Commission encouraged staff members to present this kind of proposal for their consideration. Thus, during several years of public proceedings the initial rule remained formally under consideration and the agency appeared unresponsive to reasoned persuasion. By the time the Commission began to consider the proposed rule on the merits and make changes, the political pressure and industry resistance often had built to a high level, so that even a rule modification which was actually based on a reasoned evaluation of the merits could look like a capitulation to political forces.[58] The formalized procedures of the Magnuson-Moss Act may have

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[57] That is, modifications of proposed rules were seldom recommended to the Commission by staff, except through the formal mechanism of the final staff recommendations. The two Magnuson-Moss rulemakings that were aborted before completion of the full rulemaking process were the Prescription Drugs and Cellular Plastics TRR's. Report-writing in the Prescription Drugs and Cellular Plastics TRR's. Report-writing in the Prescription Drugs proceeding was suspended on July 2, 1976, pending Commission review of the need for a rule in light of the U.S. Supreme Court's decision in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council. 41 Fed. Reg. 27391. The rule was subsequently withdrawn. 43 Fed. Reg. 54951 (Nov. 24, 1978). Initial Notice of the Cellular Plastics TRR was published July 23, 1975, but the rule never reached the hearing stage. Following lengthy negotiations between the FTC staff and major industry members, a conditional "stipulation" on an alternative rule was submitted to the Commission by the Bureau of Consumer Protection. After evaluating the legal and policy considerations involved, the Commission refused to accept the stipulated agreement. *See* Amended Initial Notice, 43 Fed. Reg. 35341 (Aug. 9, 1978). Instead the alternative Initial Notice, 43 Fed. Reg. 35341 (Aug. 9, 1978). Instead the alternative rule was published for comment, and, at the same time, the Commission solicited information on existing conditions in the industry. *Id.* After the comment period and additional staff investigation of the industry, the staff recommended that the rule be withdrawn, and the Commission tentatively agreed that the rule was no longer needed. *See* Invitation to Comment on the Tentative Decision to Withdraw the Cellular Plastics Rule, 45 Fed. Reg. 3060 (Jan. 16, 1980). The proceeding was terminated on June 18, 1980. 45 Fed. Reg. 41156.

[58] The following exchange occurred during the oral presentations before the Commission in the Hearing Aids TRR proceeding:

> [Consumer Group Representative]. I want to say something about the broader issue of the involvement.
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> I believe that . . . in addition to the enforcement problem, maybe part of the reason why the present staff recommendations do not provide restrictions on home sales or remove sanctions for oral misrepresentations is that there is in this country, over the last two, three years—and I guess Mr. Dixon would say going back much longer—a feeling, aversion against regulatory conduct by agencies.
>
> We have seen in industrial safety, airlines, radio, other industries in which there is now a movement to decontrol and deregulate. I don't want to pass comment on the validity of any of that. That's not my point; but I wonder whether that doesn't play a role in these recommendations. I wonder also if some of the attacks upon what is the FTC's

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contributed to these problems by lengthening the time intervals between initial and final Commission consideration of a proposed rule, by raising doubts as to whether it was proper for the Commissioners to intervene in the merits of a proceeding while it was pending before the Presiding Officer, and by raising the cost of re-noticing a modified rule if problems in the initial proposal became apparent.

E. Outside Participants

Relationships between the FTC and spokesmen for "outside" participants in trade regulation rulemaking were frequently characterized by mutual suspicion and, in the case of some rule opponents, outright hostility. A variety of factors contributed to this situation, including the personalities of the individuals involved and the intensity of the target industry's dislike for a proposed rule. In addition, the opponents typically had little incentive to reach an accommodation with the agency or to make the rulemaking process work because the industry was neither dependent on the FTC for future benefits, nor subject to continuing supervision. However, the rulemaking procedures, and the participants' perceptions of them, probably contributed to the acrimony and hostility surrounding many of the proceedings.

Tactically, some of the rule-opponents may well have argued for adjudicatory rights for the purpose of delaying the proceedings, or building in reversible error for judicial review. The novelty and complexity of the statutory procedures created a fertile field for opponents to use these tactics for defeating or postponing regulation. Beyond this, however, there appeared to be a basic difference of opinion between the FTC staff and the members of the trade regulation bar regarding both the general desirability of trial-type

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traditional conduct in the marketplace that are current—including this rule—also doesn't play a role.

My feeling is that it would be wrong . . .—on the basis of this record and this need for this population—to retreat.

Chairman PERTSCHUK. . . . I think I can set your concerns to rest. It seems to me that there are two things going on that you touch upon. One is a very real insistence on the part of critics of regulations, of this agency and others, [that] we think through very carefully the implications of the regulations that we impose and that we make certain that we do the job that the record demonstrates must be done in the most effective and least burdensome way. We have accepted that . . . responsibility. That is a matter of regulatory philosophy.

At the same time, you are also talking about the political pressures to which this agency is subject and they are doubtless there. I can tell you, speaking for myself and for my experience with the staff, that these pressures play no role whatsoever in the determination that they make or we make.

[CONSUMER GROUP REPRESENTATIVE]. I am very glad to hear that.

Transcript of Oral Presentations in the Hearing Aids TRR Proceeding, Sept. 27, 1979, at 35-36.

procedures in rulemaking, and the specific requirements of the Magnuson-Moss Act. That is, many industry participants seemed to feel very strongly that a major purpose of the public proceedings should be to give rule-opponents a fair chance to attack the factual basis of the proposed rule, using the full range of trial-type techniques. Starting from this perspective, they tended to view any departures from the full adversary model as an attempt to "railroad" a rule through by denying them an opportunity to win on the facts. Staff, on the other hand, tended to follow the official FTC position that the public proceedings should be primarily investigative or fact-gathering. As a result, they may have tended to view industry's insistence on trial-type procedures as an effort either to obstruct the proceedings, or to impose on the staff a burden of going forward that was not required by the statute. These divergent perceptions of the purpose of the proceedings may have led not only to different interpretations of ambiguous statutory language, but also to different concepts of evidence and burden of proof in trade regulation rulemaking. They may also have helped to inspire some of the complaints about staff's bias and advocacy.

Several rulemaking staffs seemed to be acting on the assumption that the traditionally relaxed proof standards of cease-and-desist adjudications, or even less stringent standards, applied to trade regulation rulemaking. Industry spokesmen, on the other hand, evidently felt that the Magnuson-Moss Act should and did impose a higher standard. For example, staff might start from the assumption that proof of the prevalence of deceptive practices was sufficient if there was evidence showing that only a small number of industry members had engaged in the prohibited conduct. Thus, a modest number of consumer complaints should be adequate to meet the statutory prevalence requirement. Moreover, evidence tending to show that the great majority of industry members were honest was really irrelevant; what mattered was whether the "prevalence threshold" had been crossed. Once that had been shown, and the other statutory requirements had been satisfied, the Commission's broad remedial discretion to regulate the practices in question and to construct elaborate "fencing-in" requirements came into play.

The following statement from the Federal Trade Commission's brief on appeal of the Vocational Schools TRR[59] illustrates the staff's viewpoint:

> The Commission's discretion to formulate an appropriate means of preventing the unfair or deceptive acts or practices . . . is necessarily even greater in rulemaking, which by its very nature involves "predictions based upon pure legislative judgment" and "judgmental or predictive" determinations such as those involved in fashioning remedies. In making such determinations, the Commission is "entitled to rely on its judgment, based upon experience" as to the appropriate remedy to impose in the rule. In this case the Commission's legislative

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[59] Katharine Gibbs, Inc., v. F.T.C., *supra* note 34.

> judgment was informed both by its general experience in formulating remedies . . . and by a long history of attempting to prevent unfair and deceptive sales practices in the vocational school industry through informal guides and numerous adjudications.[60]

Many industry spokesmen, by contrast, started from the assumption that industry-wide trade regulation rulemaking was no different from multi-party or class adjudication, since the impact of a TRR on industry members would be the same as a cease-and-desist order.[61] These spokesmen rejected staff's "broad discretion" view of the proof requirements; following is one industry participant's argument against the buyer's "right-to-cancel" provision of the proposed Hearing Aids TRR:

> The right to cancel is a devastating and novel remedy offered by the Staff as a convenient strategy to short-circuit the Commission's responsibility to define and prevent specific unfair or deceptive acts or practices. Recitation of a litany of practices which *may* be abuses effected by an *undefined minority* over a 30-year or more period is not a valid predicate for the most stringent remedial requirement ever imposed upon any company, let alone an entire industry . . . .
>
> A rule is clearly more vulnerable to be characterized as arbitrary and capricious if companies operating in conformity with the rule's definitional requirements are required to alter their business practices merely to conform to the rigid compliance specifications of the so-called "preventative" aspects of the rule. A remedial provision that is not reasonably related to proven facts or is not "reasonably necessary to eradicate the violations found to exist" will not be upheld. . . .[62]

Other industry spokesmen observed that in contrast to a cease-and-desist order, a TRR would sweep in a large number of honest businessmen, and impose both cost and stigma on them. Thus, the Commission should not (and perhaps legally could not under the subtantial evidence test) be satisfied with a low threshold showing of "enough prevalence." Rather, the staff was required to demonstrate that the abuses in question were sufficiently widespread, and sufficiently harmful, to justify the costs that would be imposed on the industry as a whole. The extent of the wrong and the reasonableness of the remedy were closely linked. The Commission could not "fence in" the industry at will once it crossed a low threshold of prevalence, but rather must be prepared to demonstrate that the proposed remedy was cost-justified. In this approach, the ratio of deceptive practices to honest transactions, or of reputable businessmen to sharp operators, was not only relevant but crucial; any attempt to suppress or ignore evidence on this point would raise real questions about the fairness of the process and the good faith of the agency.[63]

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[60] Brief for the Federal Trade Commission 44 (citations ommitted). It should be noted that the FTC relied upon an opinion rendered on review of an ajudication, Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946), to support its broad discretion to fashion "fencing-in" remedies.

[61] *See*, e.g., Post-Record Comment of the National Hearing Aid Society in the Hearing Aids Proceeding, S-1 to S-2 (Feb. 19, 1979):

> Regardless of the expectations of the purists, a Commission rulemaking proceeding is a major multipartied [*sic*] industry-wide adjudication. The interested parties may not have all of the procedural rights of a formal proceeding, but the effect is no different. A final rule is effectively a cease and desist order against an entire industry.

See also Post-Record Comment of the Hearing Industries Ass'n, Hearing Aids Proceeding, Vol. IV, at 494–495. A participant in the Vocational Schools TRR proceeding made the same point in public remarks:

> These proceedings are, in real fact, collective or class *adjudications*, and they require, as a basis for validating the rule, a record of patent, pervasive—in the terms of law, prevalent—violations of law by the affected class of industry members. Assuming the predicate, namely that this pattern of law violation exists, the prosecutorial function of the staff is healthy and desirable.

Wald Remarks, *supra* note 6, at 14 (emphasis in original).

[62] NHAS Post-Record Comment, *supra* note 61, at 189–190.

A rule opponent who entered the proceeding with this perspective and a desire to challenge the staff on the facts could encounter multiple frustrations. The inability to pin down the staff evidence and theories, or to get consideration of seemingly crucial issues like the proportion of industry members who have used deceptive practices and the cost-justification for the remedy, could breed cynicism toward the process. Also, the low proof threshold might mean that, no matter how convincing a case the rule opponents presented, the staff would still be able to muster sufficient data from the record to support a rule. The Commissioners' remoteness from the hearing evidence, their dependence on the staff for information and advice about what the record contained, and their almost exclusive focus on policy and legal questions rather than factual matters during the final shaping of the rule could well convince a rule-opponent that the opportunity to challenge the factual basis of the proposed rule was more apparent than real: the process provides numerous opportunities to participate, but few real chances to win on the facts. At the same time, *ex parte* prohibitions limited the outside participants' opportunities to express their policy concerns to the Commissioners, or to seek out an acceptable middle ground. Oral presentations were limited in time, and conducted in a format that made it nearly impossible to explore compromise possibilities; final comments were submitted before there was any feedback from the Commissioners, and in any event these comments might be filtered through staff summaries rather than read by the Commissioners themselves.

In short, the absence both of clear ground rules for influencing the decision and of direct, informal access to the decision-makers is a potentially destructive combination. It creates a strong incentive for rule-opponents to channel their efforts outside the Commission: to press their factual and legal arguments before reviewing courts, and to bring their policy objections to the Congress. The Second Circuit's decision in the Vocational Schools appeal, and the congressional oversight hearings conducted during 1979, suggest that these external reviewing bodies may be very receptive to the complaints of the rule opponents. It would be an oversimplification to say that the rulemaking procedures have created the Commission's problems with the Congress and reviewing courts, but they may well have lent fuel to the fires. At the least, the rulemaking procedures did not make it easy for the FTC to respond to problems and objections in a timely fashion, or to explore compromise solutions.

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[63] *See e.g.*, Joint Reply Brief of Petitioners NHSC, NATTS, AICS and NACS in Katharine Gibbs School Inc., v. FTC, *supra* note 34, at 8; Katharine Gibbs Brief at 49–52.

III. ASSESSMENT OF THE HYBRID RULEMAKING PROCEDURES EMPLOYED BY THE FTC

One persistent problem in trying to evaluate the procedural aspects of the Magnuson-Moss Act is the difficulty of distinguishing failures of implementation from defects that may be inherent in the basic structure or assumptions of the statute itself. Of necessity, the latter component of the evaluation must be more speculative than empirical, since this study was not able to gather much data concerning alternative ways of implementing this type of hybrid rulemaking statute. The following portion of the evaluation is directed toward an overall assessment of the hybrid procedure *as implemented by the FTC*; more general observations about the characteristics of hybrid rulemaking are offered in Part IV.

A. Criteria for Evaluation

The general standards or criteria used in evaluating the FTC's rulemaking procedures can be divided into three categories. First, the process should encourage, or at least permit, the agency to make accurate decisions about the matters under consideration. It should also assure fairness to those who will be affected by the decision, by affording them reasonable opportunities to participate and to influence the outcome. Closely related to fairness is the concept of acceptability: affected interests should perceive that the process is fair and that the final decision constitutes a legitimate exercise of governmental power. Finally, the procedures should be efficient with respect to the amounts of time and other resources they require to produce a decision.

Translating these general goals into a set of more specific and objective measures that can be used to evaluate the trade regulation rulemaking process raises a series of practical and conceptual problems. In the discussion which follows, an effort has been made to highlight the assumptions that were made and to note the limitations in data and analysis.

B. Accuracy

As Professor Davis has pointed out, measuring the "accuracy" of administrative decisions is difficult and perhaps impossible in any absolute sense.[64] This is particularly true in a context like trade regulation rulemaking, where there is little consensus on the extent to which the underlying decision should be based on reasoned consideration of record evidence, or designed to achieve mutual accommodation and political responsiveness—in short, whether it should be "technocratic" or "democratic."[65] The structure and legislative history of the Magnuson-Moss Act suggest that a major purpose of the statute was to heighten the element of reasoned decision-making in trade regulation rulemaking by requiring the Commission to set forth its factual and analytical basis for the proposed rule, and by giving interested persons a full opportunity to challenge that basis both before the agency and on judicial review.[66] In these respects, the statute can be considered a precursor of the more recent proposals to require that agencies conduct a regulatory analysis when making significant decisions.[67] However, much of the criticism and debate concerning trade regulation rulemaking has centered on the Commission's perceived failure to be politically responsive—its lack of consultation or negotiation with the affected industries, its unreceptiveness to formal and informal congressional critiques of particular actions, and its rhetoric and advocacy tactics in particular proceedings.[68]

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[64] 2 K. Davis, Administrative Law Treatise 317–21 (2d ed. 1979).

[65] *See, e.g.,* Prepared Statement of Margery Waxman Smith, Acting Director, Bureau of Consumer Protection, Federal Trade Commission, in *Hearings on H.R. 3361 and Related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 95th Cong., 1st Sess. 518–519 (1977):

> These [procedural] requirements make obvious the dual nature of rulemaking proceeding. At one level it is an exercise in participatory democracy. The Commission, before it pases on a final rule, should know what interested persons think of the idea . . . . The second dimension of rulemaking under the Improvement Act is technical.
>
> . . . [T]he requirement that the Commission advert to a rule's economic impact seems to me to make clear the Congressional intent that the Commission should look for more than unsupported opinion in the course of its rulemaking proceedings. The evidence relevant to a rulemaking proceeding may include not only testimony on personal experience, but also survey research, literature summaries, or statistical, economic, financial or scientific studies.

[66] *See generally* ACUS Phase I Report, Chapter II.

[67] *See e.g.,* S.755, 96th Cong., 1st Sess. § 602 (1979) (Administration Bill); S.2147, 96th Cong., 1st Sess. § § 622–626 (1979) (Culver Bill).

[68] *See generally Oversight Hearings on the FTC Before the Subcomm. on the Consumer of the Sen. Comm. on Commerce, Science, and Transportation,* 96th Cong., 1st Sess. 27–28, (Sept. 18–19, Oct. 4–5, 1979). More specifically, see Statement of Richard J. Leighton, Special Counsel to GMA (Sept. 28); Statement of Stan Matthews, representing the Mineral Insulation Mfrs. Ass'n (Oct. 4); Statement of William Cavanaugh, President of ASTM (Sept. 27). *See also The Federal Trade Commission - Business' Government Enemy No. 1,* National Journal, Oct. 13, 1979, at 1676; *Eternal Quest for the Correct Antitrust Policy,* Legal Times of Washington, Oct. 15, 1979, at 9.

The discussion in this section will be focused primarily on the "reasoned decision-making" element of trade regulation rulemaking. That is, the underlying assumption will be that the purpose (or at least a major purpose) of the process is to gather, test, and evaluate relevant data, to assess the views and arguments of interested persons, and to produce a decision that is reasoned, explained, and based upon the rulemaking record. Considerations of political responsiveness will be taken up in Part IV. The basic approach in this section is to try to identify aspects in the process which serve to frustrate or undermine the goal of reasoned decisionmaking. In other words, it should be possible to make useful judgments about the ways in which the procedures facilitate or impede reasoned decisions, without necessarily having some yardstick to judge the quality or accuracy of the decisions themselves.

1. LACK OF PROCEDURAL STRUCTURING

According to the Rules of Practice[69] and other official FTC statements,[70] the posthearing procedures are designed to sharpen the issues

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[69] This function of the posthearing procedures is suggested by (1) 16 C.F.R. § 1.13(f) (1980), which indicates that the Presiding Officer's report is to focus upon the previously designated "disputed issues of material fact"; (2) 16 C.F.R. § 1.13(g) (1980), which indicates that the staff report is supposed to "tak[e] into account the presiding officer's findings of fact"; and (3) 16 C.F.R. § 1.13(h) (1980), which requires that post-record comments "shall be confined to information already in the record."

[70] The following statements from the FTC's Report to the Congress on Magnuson-Moss Rulemaking reflect the official agency position on how the procedures ought to work, rather than a description of the way the process operated in practice:

> After the close of the hearings, neither the Administrative Procedure Act nor the Magnuson-Moss Act requires that the Commission afford interested persons any further opportunity to participate in the decisionmaking process. . . .
>
> The Commission recognized, however, that the process of accepting written comments, oral presentations, and rebuttal submissions, while an excellent one for receiving the views of all affected persons, should be supplemented by additional procedural devices. These additional devices were intended to identify and sharpen the issues on which a dispute still existed, identify the information already in the record of the proceeding which pertains to those issues, and learn the positions of the participants on those issues.

FTC's Report to Congress, *supra* note 12, at 53. That Report also emphasizes the importance of post-record comments as a device for sharpening and narrowing issues:

> Comments on the reports, usually called "post-record comments," are limited to matters already in the rulemaking record. Thus, interested persons cannot use this opportunity to introduce new material in the record . . . . Instead, this opportunity to submit post-record comments is intended to give participants an opportunity to identify for the commissioners themselves important record information that may support, contradict or simply have been overlooked by the staff or the presiding officer. It is also an opportunity to support or criticize the position of the staff, which has now crystalized into a specific recommendation for or against a proposed rule. Alternative proposals (with support

raised at earlier stages. In practice, however, this objective was realized only to a limited extent; more frequently, the posthearing procedures resembled unrestricted comment periods. One reason why this happened was that the Commission failed to give adequate guidance, either in general procedural rules or in statements about individual TRR's, regarding the importance of particular issues or items of proof. A second contributing factor was that the few existing constraints on the content of posthearing submissions provided in the Rules of Practice were largely unenforced.

(a) Rebuttal

According to the statute and the Rules of Practice, rebuttal submissions were supposed to address "disputed issues of material fact."[71] In addition, the concept of "rebuttal" implies that the submission in question is designed to refute some particular piece of evidence already introduced into the record. In practice, however, neither limitation was enforced very strictly by the FTC's Presiding Officers, and they generally accepted any

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identified in the record) or reasons why the rule is unnecessary may also be submitted.

. . . . .

> After the close of the post-record comment period, the entire rulemaking record is transmitted to the Commission. The record contains several documents intended to focus the issues, presentations, and positions of the participants: these are the staff report, the presiding officer's report, and the post-record comments.
>
> . . . . .
>
> [T]he Comission reviews the rulemaking record including the final written and oral comments. At the public meeting, the Commission determines whether to promulgate a rule and, if so, the form of that rule. The result of this whole process of decisionmaking is that by the time of the Commission meeting, the issues are sharply focused, the information on the issues has been illuminated by the presiding officer, the staff, and the participants, and the final positions of the participants at the oral presentation are fresh in the minds of the commissioners. This process which begins with a broad base of relevant factual information affords all participants the opportunity to challenge and rebut the information, and finally to identify issues still in dispute for the Commission. This focusing of the issues (or "funneling" as ACUS terms it) results in fair and fully informed decisionmaking.

Id. at 55-58.

[71] The Magnuson-Moss Act states that "an interested person is entitled— . . . (B) if the Commission determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted . . .) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues." 15 U.S.C. § 57a(c)(1) (1976). The FTC's Rules of Practice generally track the statute, but add the following criterion to be considered in evaluating specific requests for cross-examination: "(B) [whether a] full and true disclosure with respect to the issue can only be achieved through examination, including cross-examination rather than through rebuttal submissions or the presentation of additional oral submissions." 16 C.F.R. § 1.13(d)(5) (1980). This preference for rebuttal over examination was reversed in practice. *See* ACUS Phase I Report, Chapter VI at 40 (text accompanying notes 87-90.)

plausible rebuttal submission. In this respect, they virtually carried forward the FTC's pre-Magnuson-Moss practice of holding the rulemaking record open for a fixed period after the oral hearing for the submission of any data, views or arguments that interested persons might wish to submit.

Several factors probably contributed to the Presiding Officers' liberal approach to rebuttal submissions. Even though the language of the statute indicates that the agency could reject a rebuttal submission if it found that the material was not "appropriate" or "required for a full and true disclosure" of disputed issues of material fact, these phrases provided little or no guidance in practice. In particular, the failure of the "disputed issues" concept left no doctrinal benchmark, either in the statute or Rules of Practice, for measuring a particular submission.[72] In addition, it would have created both bad public relations and a risk of reversal if the agency had rejected major rebuttal submissions under these vague statutory standards.

Despite the lack of useful criteria in the statute and Rules of Practice, the Presiding Officers often did attempt to place some limits on rebuttal submissions through instructions to participants at the end of the oral hearings.[73] Generally, the Presiding Officers tried to discourage submission of argument, additional comment, or new evidence. Additional argument or comment was not as great a concern to Presiding Officers as new evidence because, as the Chief Presiding Officer noted in one proceeding, "even if I receive something that is labeled rebuttal but looks to me to be in the nature of rehash of arguments we have already had, I could treat the submission as so many pieces of paper and insert it in the record and forget it."[74] The submission of new evidence under the guise of rebuttal, however, was much more worrisome. Participants might well be tempted to use this subterfuge not only to protect their witnesses from cross-examination, but also to put on the record evidence which had become available too late to meet the hearing deadlines. If some of the participants could smuggle in significant new data in this fashion, their opponents could plausibly claim that they had been denied the opportunity to test this evidence through cross-examination and rebuttal (or surrebuttal). The agency then would face the dilemma either of reopening the hearings or risking a procedural reversal for denying cross-examination rights.[75] Thus, although the volume of rebuttal was small in comparison to other portions of the rulemaking records,[76] it generally reflects the difficulty of managing a hybrid proceeding in which some but not all of the evidence is subject to adversary testing in a trial-type hearing.

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[72] *See generally* ACUS Phase I Report, Chapter IV, for an analysis of the FTC's implementation of the "disputed issues" concept.

[73] *See, e.g.*, Presiding Officer's Instructions to Group Representatives in the Hearing Aids Proceeding, Sept. 16, 1976 at 1-2; Presiding Officer's Instructions in the Used Cars Proceeding, Transcript at 7955-57; Discussion With Respect to Rebuttal in the Food Advertising Proceeding, Transcript at 8686-94. The instructions of the Presiding Officer in the Protein Supplements Proceedings are exceptional for their clarity and precision with respect to the purpose of rebuttal:

> [R]ebuttal submissions must be limited to evidence which, one, relates to and bears directly upon a particular identified statement made by a particular identified witness, and, two, which disproves or has the tendency to disprove or counteract the identified statement. Rebuttal must be limited and relevant to information already entered on the record as written comments, oral testimony, or documentary evidence. Proper identification of exactly what is being rebutted is required. Always cite the page of transcript or section and page of the public record where the statement appears.
>
> In addition, rebuttal statements should be directly relevant to issues designated in the Final Notice . . . for this proceeding . . . or such other pertinent facts which are clearly and explicitly cited in the rebuttal statement. Further, the basis for and source of rebuttal statements must be furnished.
>
> Rebuttal submissions are for the purpose of rebutting specific assertions of fact and not for entering on the record for the first time documentary support for factual positions which could have been reasonably anticipated and made the subject of testimony or other proof during the proceeding. . . .
>
> Rebuttal statements in general are not to be used for the purpose of rehabilitating witnesses, changing testimony, making additional general comments or policy comments or otherwise misusing the privilege envisioned by the rebuttal period. The Presiding Officer reserves the right to reject or disregard submissions not in compliance with the above instructions and, if deemed appropriate, may require justification for rebuttal submissions.

Protein Supplements Tr. 3759-60.

In practice, the Presiding Officers generally tried to draw the line between comment, argument, and insignificant new evidence, which they freely allowed, and significant new data, which they tried to exclude. Given the language of the statute and the general structure of the proceedings, it is not clear that any better approach could have been adopted. First of all, it would have been burdensome for participants, and difficult to enforce within the time available, to require that submitters demonstrate a specific linkage between their rebuttal and items previously submitted for the record.[77] Secondly, since witnesses were not restricted in the kinds of testimony they could present,[78] it was almost always possible for a submitter to find some broad statement in the transcript which he could claim to be rebutting. Nor is it clear that an attempt to restrict rebuttal to narrow or specific factual issues would have been productive, given the open-ended nature of many proceedings when the hearings ended. The Presiding Officers had to write their reports prior to issuance of the final staff report and receipt of final public comments, and some of them reported that further comment and argument submitted as "rebuttal" helped them analyze the issues during report-writing.[79]

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[74] Food Advertising Transcript at 8694.

[75] *See, e.g.,* the statement of the Chief Presiding Officer in the Food Advertising Proceeding, Tr. 8694:

> If we get something of real substance by way of legitimate rebuttal which is in essence new evidence not previously presented, I think I am going to be confronted with a problem of why it wasn't presented in a more timely manner, why was it presented here for the first time.
>
> . . . I am going to be left with a couple of questions after that. One, what sort of additional proceedings should such material trigger, if any at all. Would it be something that would require additional cross examination, which is a ghastly prospect to contemplate[,] or whether it is something that couldn't be handled by a simple extension of the rebuttal period for the very limited purpose of responding to this new material that has come in.

[76] *See* Appendix C to this report.

As a result of the lenient approach taken by the Presiding Officers, the rulemaking records included a wide variety of rebuttal material: comments which had been filed after the deadline for the prehearing comment period; collections of articles from technical journals; data and expert testimony which the parties had been unable to obtain in time for the oral hearings, or which they were trying to shield from cross-examination; argument and analysis which served the function of proposed findings of fact and conclusions of law; and miscellaneous efforts to discredit unfavorable testimony, ranging from anecdotal or nitpicking credibility attacks to elaborate expert "analysis-critiques" of technical testimony. It may be useful to examine some of these types of "rebuttal" submissions more closely.

a. *Rebuttal of specific facts.*—In several proceedings, particularly those in which the rule was designed to combat deceptive or oppressive selling tactics, industry members spent considerable time and effort refuting comments or witness testimony about particular transactions. Funeral directors went to great lengths to rebut consumer complaints in the Funeral Practices rulemaking, as the following submission indicates:

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[77] The prevailing attitude is exemplified by the following statement of the Presiding Officer in the Used Cars Proceeding:

> I don't think that it is necessary to set very stringent guidelines on the rebuttal. . . . I do believe that rebuttal by definition would seem to require that you rebut something previously placed on the record. . . . I would ask that anything submitted during the rebuttal period be keyed to materials already in the public record. By that I mean cite and locate the specific materials in the record being rebutted.
>
> Now, for those not having immediate access to the transcript or the written record, if those parties will identify the record to the extent of telling us whose comment it is they are rebutting and the substance of the particular portion of that comment that they are directing their rebuttal to, I will then take it upon myself to find the page or pages of the witnesses where there is submittal or testimony and identify it. Apart from these few ground rules, I don't believe that any additional guidelines can be discussed on this subject.
>
> I prefer to leave it broad, as I say, and not spend a great deal of time exercising ourselves in specifics on the record. That will provide us with a degree of flexibility we might not otherwise have.

Used Cars Tr. at 7955–57.

[78] The statute generally provides that "an interested person is entitled—(A) to present his position orally or by documentary submissions (or both)." For a description of the kinds of testimony actually presented in TRR hearings, *see generally* ACUS Phase I Report, Chapter VI.

[79] Interview with Presiding Officer, Care Labeling Proceeding, Mar. 6, 1978; Interview with Presiding Officer, Protein Supplements Proceeding, Apr. 14, 1978.

> As a response to the complaint filed against our firm by Mr. Horwitz, I wish to state the following:
>
> There were no overcharges in the funeral in question. I am submitting an itemized statement to verify this. The entire funeral was handled as ordered by the wife who was next of kin.
>
> I am enclosing a noterized *sic* letter from Mr. Horwitz withdrawing the complaint, and a letter from the wife of the deceased stating that she was satisfied with our service, and that there were no overcharges on our part.[80]

Here, as in cross-examination, the question which arises is not whether the procedural devices are appropriate to test or refute the accuracy of this kind of factual information; rather, there is a more basic issue as to whether these individual transactions or anecdotes are relevant to the ultimate decisions which the Commission must make. The few evidentiary standards which the FTC has articulated in trade regulation rulemaking indicate that individual consumer complaints are indeed relevant: in the R-Value statement of basis and purpose, the Commission stated that "the issue of prevalence requires the Commission to examine all of the materials in the record," including the number of consumer complaints.[81] The combination of a statutory right to contest the factual basis of the proposed rule, together with evidentiary standards which fail to limit or weight relevant data, make it impossible to say that this type of rebuttal is inappropriate. However, it is hard to imagine that the effort is cost-justified, particularly when the Commission may extrapolate a prevalence finding from a relatively small number of unchallenged consumer complaints or may make a general judgment based on its impression of the whole record.[82]

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[80] Funeral Practices TRR Record, Vol. 215-46-1-30-5, at 3419.

[81] 44 Fed. Reg. 50218, 50224 (Aug. 27, 1979):

> In making its assessment of the frequency with which unfair or deceptive practices are occurring in the home insulation industry, the Commission must consider a number of factors. These include the number of consumer complaints; the opinions of experts in the field; documentary evidence such as insulation labels, advertisements, and other promotional materials; the testimony of industry members regarding the need for a trade regulation rule; studies and investigations performed by state and federal governmental agencies; newspaper investigations and exposes; and the Commission's own prior experience in regulating the practices of insulation industry members through individual cease and desist orders. In sum, the issue of prevalence requires the Commission to examine all of the materials in the record.

[82] At times, the points made in this type of rebuttal seem quite trival, as in the example from the Holder In Due Course amendment proceeding where a legal aid attorney rebutted the testimony of a finance company official who had stated that the company was found "not guilty" in a suit brought by the legal aid office. The legal aid lawyer's rebuttal showed that the court had found the company "guilty" but had not awarded damages; moreover, a motion for a new trial was subsequently granted. Record Vol. 215-31-1-17, at 140-41.

Similarly, the Commission can simply disregard rebuttal, as it did with a credibility challenge in the Vocational Schools proceeding. There, an individual who claimed to be a former salesman for one of the participating proprietary schools gave testimony damaging to the industry. One school responded with a rebuttal submission stating that they had searched their records but found no indication that the person had ever worked for them.[83] The staff in its report and in the final statement of basis and purpose continued to rely on the witness' testimony, without responding to the credibility attack.[84]

b. *Rebuttal of empirical research and expert opinion.*—The value of rebuttal tended to be commensurate with the utility of the evidence being rebutted. Thus, some of the most helpful "true" rebuttal submissions were those which pointed out the errors or limitations of expert testimony, particularly when the testimony in question described field research or other empirical studies. Perhaps the most frequent submitters of expert rebuttal were the industry representatives who had sufficient resources and expertise to recruit other experts to critique studies introduced at the hearing.[85] In Food Advertising, for example, an industry spokesman produced rebuttal which found major flaws in a consumer group's survey purporting to test consumer understanding of the terms "organically grown," "natural," and "health." The rebuttal submission raised a number of technical points which might be overlooked by a non-scientist listening to the testimony: deficiencies in the techniques used to code responses to open-ended questions; conclusions which were arguably not supported by the data; instances in which the researchers had ignored or overlooked data inconsistent with their conclusions; and problems in the wording of the questions.[86] The rulemaking staffs also used rebuttal in this fashion. In Hearing Aids, for example, they obtained a rebuttal statement from a university professor who also had been co-investigator on a study which a witness had cited in his testimony. He concluded that the data "neither support nor refute the witness' contention," because the study had been conducted for a different purpose and did not address the questions discussed by the witness.[87] Similar illustrations can be found in most of the proceedings observed during this study.[88]

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[83] Vocational Schools TRR Record, Vol. 215-38-1-12-5, Item L-58:

> LaSalle has maintained a permanent record on every one of its representatives through whom one or more students has been enrolled, and of all its sales managers, since at least 1964. I have personally and thoroughly searched LaSalle records of sales personnel to locate any record of Mr. Lopez. LaSalle has no record of any sales representative or manager named Roland E. Lopez, in 1971, or at any time. I am [also] advised that Mr. Lopez testified that when he allegedly worked for LaSalle, the school offered an electronics course costing one thousand seven hundred and fifty dollars ($1,750.00) and that it offered three courses costing over fifteen hundred dollars ($1,500.00), in the subjects of electronics, drafting and law. These statements are false.
>
> In fact:
>
> (1) LaSalle offered no electronics course in 1971. It first offered such a course in 1973
>
> . . . . .
>
> (3) LaSalle has never offered any course for a tuition of fifteen hundred dollars ($1,500.00) or more, nor any figure close to that.

For an example of a similar credibility attack by the FTC staff, *see* Hearing Aids Rebuttal Document 54, at 1 (no record of graduate studies claimed by witness).

[84] This issue was raised on judicial review of the final TRR by some of the participating schools:

> Cross-examination and rebuttal statements showed that [the witness] was lying and had never worked for LaSalle. His testimony was obviously worthless. Nevertheless, he was reportedly cited and relied upon in the staff report. Written comments upon the staff report pointed out the cross-examination and rebuttal of Lopez. Nevertheless, Roland Lopez is cited again in the Statement of Basis and Purpose as a former LaSalle salesman and with no indication that there might be any reason to question his credibility.

Brief of Petitioners Katharine Gibbs School, Inc. and Katharine Gibbs School-Huntington, Inc., *supra* note 34, at 47–48.

Expert rebuttal of this kind can be useful to decision-makers, particularly in a situation like FTC rulemaking where they do not have great experience or expertise in the individual industries covered by the rules.[89] However, some problems did arise. Expert rebuttal typically involves judgments as to whether the witness followed appropriate methodology, and how the findings of the particular study fit into the general pattern of knowledge in the relevant discipline.[89a] Both approaches tend to lead beyond the confines of the testimony being rebutted into matters that are arguably "new evidence." At times, the group representatives raised disputes over this point, as in the Food Advertising proceeding where industry spokesmen unsuccessfully requested the right to cross-examine experts whose rebuttal submissions had been recruited by the staff.[90] Finally, the FTC's timing of expert rebuttal in relation to cross-examination may not be ideal. Logically, it might make more sense to test the technical validity and implications of expert testimony through written rebuttal submissions

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[85] Occasionally, compensated consumer groups filed expert rebuttal submissions; *see, e.g.*, Rebuttal Submission of the Continental Ass'n of Funeral and Memorial Societies in the Funeral Practices Proceeding, Vol. 215-46-1-30, Submission 3, pp. 1995-99. For a general breakdown of the kinds of constitutent groups submitting rebuttal in the "core" proceedings, *see* Appendix A, Tables 1-7.

[86] Food Advertising Record, Vol. 215-40-1-14-1, Item M-5.

[87] *See* Hearing Aids Rebuttal Document 66A, at 1.

[88] For other examples of expert rebuttal, *see* Rebuttal of Lee and Alexandra Benham, Ophthalmic Goods, Vol. 215-52-1-9-3 at 17399-427; Rebuttal of Wm. Wilkie, Associate Professor of Marketing, Food Advertising, Vol. 215-40-1-14-1, Item M-1; Rebuttal of Prof. Charles Osgood, Food Advertising, *id.*, Item M-4.

[89] For example, the Presiding Officer's report in the Credit Practices rulemaking frequently cites rebuttal submissions, particulary in assessing the technical economic evidence introduced in that proceeding. *See generally* Presiding Officer's Report in the Credit Practices Proceeding 287-301 (August, 1978).

[89a] *See, e.g.*, Hearing Aids Rebuttal Document 55A, at 9-12. This was an "analysis-critique" prepared by an expert retained by the FTC staff to rebut the testimony of a witness named Teter, who was a professor of speech pathology and audiology.

> Teter's comments regarding the elderly and their willingness to complain about possible sales abuses is in total contrast to the experience reported by me. . . .
>
> Some authors indicate that the withdrawal of many older people stems from their

(Continued)

(Continued)

> decreased mobility. For example, Oyer and Oyer (Oyer, H.M. and Oyer, E.J., (ed), *Aging and Communication*, 1976) indicate that a lack of transportation may interfere with the older persons [*sic*] ability to interact with people and events to the extent that younger mobile persons can. . . . Willeford (1971) also indicates that changes that occur in the personality of the aged, in addition to sociologic factors and a general deterioration in their state of health may well interfere with the older person's willingness to follow through on recommendations made by professional persons.
>
> Teter also takes the position that there is no correlation between physical and emotional and mental deterioration in the elderly. This view appears to be in diametric opposition to the comments of established authorities in the area of aging. For example, Birren . . . identifies three kinds of aging: biological, psychological, and social. This author summarizes a body of knowledge confirming that various cells deteriorate with age. He also acknowledges that insoluable [*sic*] deposits are found within muscles and the central nervous system of the aged implying that these substances may interfere with the normal function of an organ or with the nervous system. Furthermore, he documents changes that occur in the circulation of aged persons (arteriosclerosis) that have a very direct effect on the efficiency of the central nervous system.
>
> Birren also provides information to support his claim that the learning abilities of a healthy older adult through age 70 at least may be better on certain mental tasks than for younger adults such as vocabulary, comprehension of verbal statements and arthmetric problems. In contrast, he cited information which indicates that the elderly perform more poorly than young adults on tasks requiring spatial perception and rapid decoding of information. The distinction is clearly drawn, however, between the healthy older person and the individual who is in poor physical condition. The latter individual according to Birren may well show a decrease in their [*sic*] mental abilities.
>
> Pollack . . . indicates that long term studies on older persons have clearly established that with advancing age a decrease in . . . perceptual, perceptual motor and intellectual functioning' occurs. In addition, he comments that cerebral dysfunction of a diffuse nature in the aged is supported by changes that are noted in the electro-encephol-graphic records (brain waves) obtained on these individuals.
>
> On the basis of this brief summary, it would appear that Teter's views concerning the aged are inconsistent with those held by recognized experts on the subject.

[90] The following rationale for the request is given in Letter from Gilbert Weil, Counsel for the Association of National Advertisers, to Presiding Officer, Food Advertising Proceeding, May 2, 1977:

> The reasons such cross-examination is needed for full and true disclosure of facts material to disputed issues is that their rebuttals attack head-on certain of the testimony and written statements of such witnesses as Doctors Haley, Ward and Ray, and of Messrs. Bell and Hale. Resolution of such conflicts depends heavily upon weighing the relative

before allowing the group representatives to conduct oral questioning. Reversing the procedural sequence in this fashion might reduce the group representatives' tendency to engage in "shotgun" probing or peripheral credibility attacks on cross-examination; however, the FTC's Rules of Practice were not designed to permit this kind of movement from paper exchanges to oral proceedings.

c. *Credibility attacks.*—Occasionally rebuttal submissions adopted the familiar cross-examiner's technique of challenging the credibility or veracity of an opponent's witness. Some of the most aggressive use of rebuttal for this purpose occurred in the Hearing Aids proceeding, where the FTC staff made a concerted effort to discredit industry witnesses. Their rebuttal submissions attempted to show that particular witnesses lacked formal credentials which they had claimed in their testimony,[91] and also purported to cast doubt on a rule opponent's reputation for honest dealing. One of these latter credibility attacks gave rise to an extended controversy. To rebut the testimony of an audiologist who had testified against the rule, staff filed

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> credibilities of the opposing witnesses,—hence, of the ability to maintain and justify their opinions and the purported foundations for them in the face of cross-examination. The witnesses Haley, Ward, Ray, Bell, and Hale have all appeared and been available for and subjected to *in personam* examinations and cross-examinations in that respect. Rebutters Osgood, Wilkie and Hunt have not. Either the scales should be evened by requiring that they be produced for such purposes, or their untested statements must be subordinated as evidence to those of the witnesses [that] they snipe at from shielded positions.

The Presiding Officer denied the request, but suggested an alternative way for ANA to rebut the rebutters:

> In my view, your request misconstrues the respective functions of cross-examination and rebuttal submissions in trade regulation rule proceedings. Congress created a statutory scheme in which both procedures were to be utilized and neither was subordinated to the other, whereas your request seems to be predicated on the assumption that cross-examination is always to be the last event which takes place whenever any dispute exists. [T]he three submittals at issue . . . seem to me to be classic rebuttal by way of argument and no useful or statutorily required purpose would be served by requiring the writers to attend for purposes of cross-examination as to their opinions.
>
> . . . Further, it would be well to remind all . . . parties who will receive . . . this letter that the post-record comment period is still available for purposes of additional comment on material in the record depending upon the use made of such material in the reports filed by the Presiding Officer and staff.

Letter from William Dixon, Presiding Officer, to Gilbert Weil, May 12, 1977.

[91] *E.g.*, Hearing Aids Rebuttal Document 54, at 1:

> [The witness'] claims [of having done] graduate work appear to be totally unfounded. Colorado State University reports that [the witness] received a bachelors degree in hearing and speech science in 1969. However, Colorado State University, Denver University, and the Universty of Colorado fail to confirm [the witness'] claim that she had pursued graduate studies with them. [Letters from officials of the three named schools were attached.] In addition, I also called [the witness] and asked if she had attended graduate school at any of these Universities. She stated that she had not attended graduate school at Colorado State University[,] declining comment on the other universities.

documents purporting to show that a hearing aid dealer who was a business partner of the witness had signed a consent order in a state consumer fraud investigation.[92] An industry trade association objected to this rebuttal, arguing that it was not only "guilt by association" but also irrelevant: the witness and the hearing air dealer had both been minority stockholders in a business which "has no relationship whatsoever to the sale of hearing aids."[93] The witness himself also filed a response, stating that he had been investigated and exonerated by state and professional licensing bodies, and that he was not in the business of dispensing hearing aids.[94] The amount of time and effort invested in this exchange seems wholly disproportionate to any conceivable utility that the information in question might have in the ultimate decision about the need for a rule. The Hearing Aids rulemaking was admittedly an exceptional proceeding, one where the scope and the intensity of the staff's attacks on the credibility of rule opponents convinced the Commissioners that the staff attorneys were biased.[95] However, it does illustrate the kinds of peripheral materials that may be submitted, and the adversary gamesmanship that may arise, under a liberal rebuttal practice.

d. *Rebuttal of general assertions as a means of introducing untimely evidence, proposed findings, legal arguments, and miscellaneous materials.* —The absence of meaningful restrictions on the content of either witness testimony or rebuttal submissions made it possible for the participants to find some general statements in the testimony, and to link their purported "rebuttal" to those statements. By use of this device, interested persons were able to submit a wide variety of materials for the record. On occasion, it was quite clear that the rebuttal period was being used to salvage evidence which had arrived too late to meet the pre-hearing filing deadlines. One witness supporting the staff position in Hearing Aids had been unable to complete a survey in time for the hearing, and the Presiding Officer directed her to avoid testimony on that subject.[96] When the study was completed, staff submitted it to "rebut" a variety of general statements made by rule opponents, such as the assertions that "a high percentage of hearing aid consumers are satisfied" and "dealer house calls are one of the great benefits of the current delivery system."[97] The Presiding Officer accepted the survey on this basis, noting that other parties had submitted new evidence in their rebuttal documents, and that the study was not "outcome determinative of any designated issue."[98] A similar incident occurred in the R-Value rulemaking, where staff submitted rebuttal documents containing an expert's preliminary test results validating a certain testing methodology for rating insulating materials.[99] Industry strongly objected to the Commission's reliance on this material,[100] and the Tenth Circuit remanded the contested provision to the Commission following the FTC's agreement to reopen the record on the testing issue.[101]

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[92] Hearing Aids Staff Justification for Rebuttal Document 6, at 1-2.

[93] Memorandum of the Hearing Aid Industry Conference in Support of Consolidated Rebuttal Motion, Dec. 29, 1976, at 8-9.

[94] HIA Final Comments, Vol. IV, at 126-27. (Note: The Hearing Industries Association, or HIA, was formerly named the Hearing Aid Industry Conference.)

[95] Observation Report of Commission Meeting of October 24, 1979 to Consider Final Action on the Hearing Aids TRR.

[96] Report of the Presiding Officer on the Hearing Aids Proceeding, Aug. 1, 1977, at 35.

[97] Hearing Aids Staff Justification for Rebuttal Document 30, at 1-3.

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[98] Report of the Presiding Officer, *supra* note 96, at 35-36.

[99] In the statement of basis and purpose accompanying the R-Value Rule, the Commission relied on preliminary test results by a staff-retained expert to support its decision to require mineral wool insulation manufacturers to conduct representative thickness testing, even though standard reference materials (SRM's) had not yet been developed for such testing. 44 Fed. Reg. 50,218, 50,226 (Aug. 27, 1979). The test results—which showed that representative thickness testing without use of SRM's was superior to the current practice of "thin-sample" testing—were submitted for the first time during rebuttal. R-Value Rebuttal at M-714, 718.

[100] Shortly after the Commission agreed on the terms of the final TRR, mineral wool manufacturers sought to revive the representative thickness testing issue described in note 99, *supra*. A request by an industry member for a meeting to discuss the issue was denied by the Bureau of Consumer Protection's Director in February of 1979. Finally, after industry members obtained the assistance of a U.S. Senator, a meeting with the Bureau staff was held on May 4, 1979. Memorandum from R-Value Staff to File, Summarizing Meeting with Members of the Mineral Wool Insulation Industry, July 6, 1979. The meeting did not produce the result industry wanted, and the Mineral Insulation Manufacturers Association petitioned the Commission to re-open the record on July 25, 1979. The Commission denied the petition, stating that "[s]ince petitioners had a full opportunity to present their evidence and air their views during the proceeding, and since the untimely material [offered by petitioners in response to the rebuttal evidence] itself is not of sufficient significance to warrant extraordinary steps, we decline to reopen the rulemaking record." Order Denying Petition to Stay [the TRR] or to Reopen the Record, Aug. 10, 1979.

Industry members subsequently petitioned for review of the rule in the U.S. Court of Appeals for the 10th Circuit, and petitioned the Commission for a stay of the TRR. In arguing for a stay, one party stated:

> Commission reliance on the Tye data [submitted during rebuttal] violates not only the substantial evidence rule and ordinary concepts of administrative due process, but also the provisions of the Magnuson-Moss Act granting cross-examination rights to Petitioners on material issues of disputed fact. (15 U.S.C. § § 57a(c)(1)(B) and (e)(3)(B)).
>
> The rulemaking record fails to explain the method of prepartion of the Tye data, its accuracy, method of calibration and verification, or even the nature of the testing equipment used, or the sources or condition of the specimens tested. This *ex parte* data was submitted by letter, not by testimony, for the Commission's testimonial record had closed by the time it was submitted. The Commission therefore never allowed Petitioners or anyone else an opportunity to cross-examine the 'witness' Tye on his *ex parte* submission, nor any *voir dire* as to how the data was secured. There was not even an attempt to lay a foundation for receiving the *ex parte* 'evidence' on this disputed issue of material fact into rulemaking record.
>
> Petitioners believe that this *ex parte* data is incorrect, was not arrived at by statistically or scientifically valid means, and, at the very least, denied Petitioners their procedural rights.

Owens-Corning Fiberglass Corp., et al., Petition to FTC for Stay of the Effective Date of the "Representative Thickness" Testing Provision, Sept. 28, 1979, at 30-32.

While the late-arriving evidence submitted in these incidents had some significance to the ultimate decisions on the rule, other late testimony or comment which was offered as rebuttal could charitably be described as trivia. In order to rebut a rabbi's testimony that relatives of the deceased usually must view the body to confront the reality of death, the Funeral Practices staff submitted an Ann Landers column containing a letter criticizing traditional funerals because the writer felt that the living needed the money more than the ceremony.[102] Equally persuasive was the submission by the Hearing Aids staff which was designed to refute an industry witness who had used the word "many" to mean "a large majority." The rebuttal was a photocopied page from Webster's Third New International Dictionary containing the definition of "many."[103] Late-arriving consumer complaints or comments supporting the rule were brought into the record in a similar fashion, by finding some testimony by an industry spokesman to the effect that abuses were not sufficiently widespread to warrant regulation.[104]

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[101] Order for Remand in No. 79-1955 (10th Cir., Jan. 4, 1980).

[102] Staff Rebuttal Submission, Document 56, Funeral Practices Proceeding, Vol. 215-46-1-30. The Funeral Practices staff also submitted a story from the *Washington Post* reporting a study done by a Nader-affiliated group which concluded that consumers often do not complain because they do not like to be identified as victims and feel that it is not legitimate to complain. This was offered to rebut three witnesses' testimony that consumers are not reluctant to complain. *Id.* at Document 35.

[103] Hearing Aids Staff Justification for Rebuttal Document 5.

[104] *See, e.g.*, Hearing Aids Staff Justification for Rebuttal Document 46, at 2:

> The "B" set of documents consists of ten recent complaints from the State of Iowa. A comparison of the names of the sellers . . . reveal[s] that at least three of the cases involve NHAS certified members . . . Four of the complaints involve situations where the seller offered a refund privilege of some sort, but would not make good on it without official action. Two cases involved taking advantage of senile, elderly women. David Barnow testified for HAIC that while there may be an occasional "bad apple", there are no real abuses in the industry. In rebuttal, five of the ten Iowa complaints submitted involved three different Belton dealerships. John Kojis testified that Maico dealers are competent to test for hearing aids, yet one of the Iowa complaints involves a Maico dealer who sold a woman two sets of two hearing aids which never worked properly to help her.

Similar rebuttal can be found in the Funeral Practices record. For example, staff submitted a letter from the Office of Consumer Services, Dade County, Florida, which contained a sampling of consumer complaints registered with that office. In the letter, dated almost two weeks after the close of the FTC hearings the commenter expressed dissatisfaction with Florida's law on itemization. Staff submitted this late comment to rebut (1) testimony of an officer of the Florida funeral directors association that state law is adequate; (2) a letter from a California resident claiming that the funeral industry spends a great deal of money to educate consumers with respect to price; and (3) testimony of an Oregon funeral director that he finds it hard to believe that industry members are not providing enough information to consumers. Staff Rebuttal Submission, Document 7, Funeral Practices, Vol. 215-46-1-30. Another variation on the consumer complaint issue was the Hearing Aids staff's attempt to rebut industry

A few participants, mostly the group representatives who had been active participants in the hearings, tried to use the rebuttal period as an opportunity to present legal arguments. First Amendment protections for commercial speech were evolving rapidly during the period covered by this study, and rebuttal "briefs" on the issue appeared in several proceedings. Sometimes this use of rebuttal was encouraged or permitted by the Presiding Officer, as in the Ophthalmic Goods proceeding where participants were asked to analyze the Supreme Court's then-recent decision in the *Virginia Pharmacy* case.[105] In other instances, industry or consumer spokesmen raised the issue on their own initiative because they felt that provisions of the proposed rule would infringe protected speech.[106] Some participants extended their legal arguments to matters of evidence and proof, effectively converting their rebuttal submissions into proposed findings and conclusions. The Clorox Company, which participated in the Care Labeling proceeding in the hope of convincing the Commission to require that garment labels state whether the item was safe to bleach, made extensive use of this tactic. After attempting to shift the burden of proof to its opponents,[107] Clorox carefully affirmative disclosure.[108] Although the official FTC policy

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testimony that consumers are willing to complain by submitting a letter from a prospective consumer witness stating that she would testify in the TRR hearings in Chicago because "[p]hysically, I loathe the trip and going into the loop." Hearing Aids Staff Justification for Rebuttal Document 23.

[105] Interview with Henry Cabell, Presiding Officer, Ophthalmic Goods Proceeding, Aug. 24, 1977.

[106] *E.g.*, Rebuttal Submission of Grocer Manufacturers of America, Food Advertising Proceeding Vol. 215-40-1-14-1, Document M-13 (both affirmative disclosure requirements and ban on use of the words "natural" and "organic" violate advertisers' rights of free speech); Rebuttal Submission of Consumer Action, *id.* at Document M-16 (ban on use of terms "natural" and "organic" may violate First Amendment).

[107] Clorox argued that because the proposed TRR was an amendment to an existing base rule requiring manufacturers to label their garments with affirmative bleaching instructions, the burden rested on opponents of affirmative disclosure to show by substantial evidence that it was not required. Clorox Rebuttal Submission, Care Labeling Proceeding, at 2.

[108] For example, one of the arguments against affirmative disclosure was the belief that bleach was an "additive" rather than a normal care procedure. Clorox raised five objections to this argument: (1) It was speculative opinion, not supported by empirical evidence; (2) Two of the three witnesses who had taken this position recanted under cross-examination; (3) The argument overlooked evidence that garments can be damaged if bleach is not used; (4) It was rejected by qualified witnesses also were questioned about the issue; and (5) public opinion, as shown in comments and a Clorox-sponsored survey, favored affirmative bleach disclosures. *Id.* at 17-26. In summarizing the record, Clorox broke down the submissions by type (comment, oral testimony) and by source (consumer, government agency, industry, etc.), and then gave the percentages of each category who had mentioned bleach, and who had endorsed the Clorox position. *See id.* at 3-5.

prohibited the submission of proposed findings,[109] some Presiding Officers felt that it would be helpful to them to have the major participants summarize the evidence.[110] Thus, the policy was not strictly enforced.

In short, the rebuttal period was much like another comment period. Despite the formal directives, participants were generally permitted to file whatever they wished, and these submissions contained a wide variety of data, views, and arguments—some of which should have been submitted earlier, or excluded altogether. In practice, rebuttal under the Magnuson-Moss Act was very similar to the Commission's pre-amendment practice of holding the record open for a short period after the hearing for another round of comments.[111]

(b) Post-Record Comments

According to the Rules of Practice, the post-record comments (PRC's) were designed to serve the function of briefs in a trial-type hearing. The PRC's were supposed to be confined to arguments or analyses based on "information already in the record," and they were also the means by which participants could challenge the procedural rulings of the Presiding Officer.[112]

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[109] *E.g.,* Report of the Presiding Officer in the Protein Supplements Proceeding, June 15, 1978, at 8:

> [A]n interested party requested the opportunity for submission to the Presiding Officer of a post-hearing filing in the nature of proposed findings and conclusions. The request was denied on the ground that Bureau of Consumer Protection policy prohibits such post-hearing filings.

See also note 31, *supra*, and accompanying text.

[110] Interviews with Presiding Officers indicated a wide range of opinions on the usefulness of proposed findings. Some felt that it would help to reduce the burden on the Presiding Officer and assure that the decision-makers knew which evidence the parties considered most important; others felt that proposed findings would be helpful if the Presiding Officers were required to prepare something closer to a recommended decision; and others thought that such filings would unnecessarily formalize the process and duplicate the post-record comments. Interview with Jack Kahn, Presiding Officer, July 27, 1978; Interviews with Christopher Keller, Presiding Officer, Sept. 22, 1976, and April 14, 1978; Interview with William Dixon, Chief Presiding Officer, Sept. 28, 1978.

[111] *E.g.,* Hearing Transcript in TRR Proceeding on the Power Output of Amplifiers Utilized for Home Entertainment, April 13, 1971, at 76:

> Hearing Examiner Dixon: . . . I would again announce that the record will be kept open for any additional remarks for thirty days. If you have any additional comments, we will be happy to receive them.
>
> With that announcement, I declare these hearings adjourned.

[112] *See* 16 C.F.R. § 1.13(h) (1980). The FTC's Report to Congress further explained the function of post-record comments, as follows:

> Comments on the reports, usually called "post-record comments," are limited to matters already in the rulemaking record. Thus, interested persons cannot use this opportunity to introduce new material in the record. . . . Instead, this opportunity to submit post-record comments is intended to give participants an opportunity to identify for the commissioners themselves important record information that may support, contradict or simply have been overlooked by the staff or the presiding officer. It is also an opportunity to support or criticize the position of the staff, which has now crystallized into a specific

Like the rebuttal period, however, the opportunity to submit PRC's typically generated a highly diverse assortment of documents.

Although the purpose of this second opportunity for written comments was to permit public response to the Presiding Officer and staff reports, a large proportion of PRC's in several proceedings studied made no reference to either report.[113] Like prehearing comments, many of these PRC's contained only general statements supporting or opposing the rule, and it often appeared that they had been generated in the same manner as the initial comments: the writers responded to newspaper accounts of the release of the staff report, or to newsletters and other mobilization efforts mounted by interested consumer or industry groups.[114] Other PRC's—while not reflecting knowledge of the Presiding Officer and staff reports—did exhibit some understanding of the staff's final recommendations for a rule. Some of these comments contained anecdotal information or opinion about the need for the proposed rule, or the effects it would have—the hardships suffered by consumers as a result of practices that would be banned by the rule, or the costs and burdens that would be imposed on industry or particular firms if the rules were adopted. A few incorporated new technical evidence in their PRC's, either because they were not familiar with the procedures and deadlines of trade regulation rulemaking,[114a] or because the materials had not been available earlier.[114b]

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recommendation for or against a proposed rule. Alternative proposals (with support identified in the record) or reasons why the rule is unnecessary may also be submitted.

FTC Report to Congress at 55–56.

[113] Review of the PRC's in the Vocational Schools proceeding showed, for example, that of 185 submissions, totaling 1,622 pages, fewer than thirty made reference to the Presiding Officer or staff reports. The PRC's were mostly general comments ranging from one to five pages in length. Of 161 comments submitted in the Food Advertising proceeding, 99 comments reveal no understanding of the rule let alone the reports. In fact, it appears that some of the comments which were placed in the PRC category of that record may have been in response to joint FDA-USDA-FTC nutrition labeling hearings held in late 1978, rather than to the Food Advertising reports.

[114] For example, in the Funeral Practices proceeding, a funeral director solicited consumer comment using a letter which stated in part:

> We know that you have used our services as funeral directors during the past year, and we would appreciate you making comment directly to the Federal Trades [*sic*] Commission and enclosing them in the stamped envelope.
>
> It is not necessary to name the funeral director by name, but only your thoughts about the way a funeral director took care of your needs.

As sometimes happened with prehearing comment solicitations, some of the respondents had mixed or negative reactions. One commented: "I could not have any complaint at all about the service and courtesy I received, tho [*sic*] the cost of funerals is becoming *very* prohibitive. There is [*sic*] no cheap ones. Funeral Practices Record, Category X at 1350 (emphasis in original).

[114A] *See, e.g.,* the use of survey data in the Post-Record Comment of the New York Dept. of Consumer Affairs in Food Advertising, Item N–141 at 4; Post-Record Comment of Catholic Community Services in the Funeral Practices Proceeding (Aug. 8, 1978).

[114B] *See, e.g.,* Rebuttal and Comment on Reports of the Hearing Officer and FTC Staff by Consumer Action-San Francisco, *infra* note 119, at 1517–18, 1531–43 (comments (Continued)

By this stage of the process, comments from new participants stating general opinions about the proposed rule are not likely to be very useful to the Commission.[115] Yet, the release of the staff and Presiding Officer reports often receives considerable publicity, a practice which not only is likely to encourage conclusory comments but also may give regulated industries grounds for complaining that the Commission is subjecting them to "trial by newspaper."[116] Only those who have participated in prior stages of

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114B. *See, e.g.*, Rebuttal and Comment on Reports of the Hearing Officer and FTC Staff by Consumer Action-San Francisco, *infra* note 119, at 1517-18, 1531-43 (comments based on survey to test vocational school industry contentions, conducted several months after the rebuttal deadline in the Vocational Schools proceeding.) Another illustration is provided by the Care Labeling proceeding, where one industry member conducted a survey to test consumer understanding of the staff's final label disclosure regarding bleach use. Post-Record Comment of Clorox Co., Care Labeling Record, Vol. 215-22-1-26, Item 74. Presumably this was new evidence and should not have been included in the PRC, but the data seem useful and the survey could not have been conducted sooner.

In a couple of instances, the staff segregated "new evidence" in its summary of the PRC's for the Commissioners. *See* Staff Summary of PRC's in Vocational Schools at 42; Staff Summary of PRC's in Ophthalmic Goods (unpaginated). And in the R-Value proceeding, the Bureau Director noted, in transmitting the staff summary of PRC's to the Commission, that "[e]videntiary material submitted as a part of the post-record comments, in contravention of Section 1.13(h) of the Rules, that constitute new information has not been included in this summary but has been placed on the public record." Memorandum to Public Record from Division of Energy and Product Information, with Concurrence of the Bureau Director, Oct. 12, 1978. (The "public record" is a collection of arguably relevant documents which are not considered part of the "rulemaking record".) This is the only instance found of new evidence actually being excluded from the rulemaking record.

The approach followed by the Bureau Director has merit. To prevent widespread circumvention of earlier deadlines or submission requirements, new evidence cannot be generally admitted in PRC's—unless of course the Commission finds an issue of such importance that it reopens the record and gives everyone a chance to introduce or refute new evidence. Placing new evidence on the public record, rather than the rulemaking record, and notifying commenters of the disposition, is also a more diplomatic way of treating the problem than simply returning the PRC's to the submitters—an act which would have made the FTC appear arrogant and unresponsive, especially to persons who were previously unaware of the new evidence prohibition.

[115] There is, however, some tactical incentive for participants and intermediary groups to submit general comments at this stage: while the Commissioners have little or no direct access to the prehearing comments, they apparently do read the staff's factual summaries of the PRC's, and also at least the major "substantive" post-record comments. Interview with FTC Commissioner Dole, Nov. 2, 1978; Interview with FTC Chairman Collier, Dec. 29, 1977; Interview with FTC Comissioner Clanton, June 2, 1978; Interview with FTC Chairman Pertschuk, Dec. 6, 1978. Thus, an interested person might defer comments until the PRC stage of the process, or re-submit data, views and arguments that had been filed prior to the hearing, in the expectation that the submission was more likely to come to the Commissioners' attention if it were part of the PRC's.

[116] *See, e.g.*, Wald Remarks, *supra* note 6, at 7 (emphasis in original):

> As a more troubling footnote, the Commission publicly released the staff report to the press with a flourish that misled most of the nation's newspapers into believing that

the proceeding are likely to submit cogent PRC's, and the FTC's practice of mailing copies of the reports (or notice that they are available)[117] to those who have participated would be sufficient to reach those who are likely to make a substantive contribution to the Commission's deliberations. On the other hand, since many of the rules have generated political controversy and the FTC has recently been subjected to a legislative veto requirement for its TRR's,[118] the publicizing of the post-hearing reports may be justified as a contribution to the political debate over the desirability of the proposed rule.

In addition to the PRC's submitted by first-time uninformed participants, many post-record comments reflected some general understanding of the issues that had developed in the proceeding. These comments typically did not respond point-by-point to the staff and Presiding Officer reports, and they did not often cite to particular materials in the rulemaking record, but at least they did address some of the issues that emerged at the hearings. Some could be described as "late rebuttal"—attempts either to refute opponents' testimony, or to place the writer's own testimony in proper perspective.[119] At least one post-record comment filed in the proceedings studied

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the report was the Commission's own: "FTC Authorizes Release of Staff Report on Proposed Vocational School Rule," the Commission's official hotline proclaimed, hardly surprisingly giving rise to such bloody accounts as the *Boston Globe's* next day's first page expose that "FTC issued yesterday the most comprehensive and methodically documented indictment ever prepared on the business practices of the $2.5 billion-a-year private vocation school industry. . . . Dishonesty was depicted in the 552-page report as a cornerstone of the industry, rather than an isolated occurrence. . . ." The story went on to say that 'one FTC source' had described the report as 'the biggest and possibly the best project ever undertaken by the *agency*.' And the Commission's senior staff attorney was quoted as saying "[T]o compete in this industry is virtually to commit fraud."

[117] In its report to Congress on Magnuson-Moss rulemaking, the Commission stated: "The rulemaking staff sends copies of the reports to everyone who has participated in the proceeding[,] seeking comments on the issues and recommendations before the Commission." FTC Report to Congress at 55. This probably involves some overstatement since it would be very costly and impractical to send the staff report, which usually comprises several hundred pages of densely footnoted text, to everyone who had submitted a pre-hearing comment.

[118] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96–252, § 21, 94 Stat. 374.

[119] Some commenters took issue with the use of their testimony in the Presiding Officer or staff reports; *see, e.g.*, Funeral Practices Record, Category X (comments of Waring-Ashton Funeral Directors, Sept. 5, 1978; Sampson Funeral Home, Sept. 8, 1978.) In the Vocational Schools proceeding, one consumer group openly admitted it was disregarding the FTC's Rules of Practice and gave the following rationale for deferring submission of its "rebuttal document":

> Recognizing that the San Francisco and Los Angeles hearings were only two hearings in a greater series which extended across the country for a period of over two years, and recognizing further that the consumer interest was actively represented as an independent

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was essentially an extension of the congressional oversight process. The Subcommittee on Special Small Business Problems of the House Small Business Committee filed a PRC which not only took issue with specific findings in the Funeral Practices staff report, but also criticized the FTC for issuing proposed rules which had a disproportionate effect on small businesses.[120] More frequently, however, the informed PRC's focused on particular provisions of the rule proposed by staff, and discussed matters like the difficulty of complying with the TRR, or the consequences it might have, or the alternative regulatory approaches which the Commission should consider. These comments were particularly useful when the staff changed its position and recommended a rule which was quite different from the one that had been published in the Initial Notice of rulemaking.

When the staff proposed to cut back an ambitious rule or delete certain provisions, consumer groups often submitted post-record comments urging the Commission to stand by the original rule language.[121] Occasionally, staff proposals to modify rule provisions also generated useful technical comments. In the Food Advertising proceeding, for example, the staff retreated from its original position that the terms "natural" and "organic" were undefinable and inherently deceptive, and instead recommended in its final report that the Commission attempt to define these terms.[122] Commenters pointed out a variety of technical problems with the revised staff proposal, including observations that refined white sugar would satisfy the staff's definition of "natural" foods,[123] while certain processed cheeses which were known in the trade as "natural" would have to find a new name.[124] Other commenters attempted to improve the staff's definition of

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> third interest only at the two California hearings (by CA) and at the Chicago hearing (by a single attorney), CA decided to reserve its right to submit additional comments in rebuttal on the positions of the other parties until the staff report and the report of the hearing officer were issed. This, then, affords an opportunity to present a final consumer perspective on the considerations material to the T.R.R.

Rebuttal and Comment on the Reports of the Hearing Officer and Staff by Consumer Action—San Francisco, Feb. 28, 1977 (Vocational Schools Record, Rebuttal Document Q 160 at 1511.)

[120] Funeral Practices Proceeding Post-Record Comment of the Subcomm. on Special Small Business Problems of the House Comm. on Small Business, Sept. 19, 1979.

[121] *See, e.g.,* Joint Consumer Group PRC in Funeral Practices Proceeding, Sept. 20, 1978.

[122] *See* Staff Report in Food Advertising Proceeding 224–25.

[123] Food Advertising Record, Category N, Item N-126. (*See also id.* at Item N-20, where the same commenter, who had testified as an expert witness for the staff, accused them of caving in to those who profit from "quackery".) In its PRC, the Sugar Association also noted that refined sugar would satisfy the staff's definition of "natural", but the Association was understandably less critical of this result. *Id.*, Item N-144. The Center for Science in the Public Interest urged more specificity in the definition, and argued that refined sugar should not be considered a "natural" food. *Id.* at Item N-148, p. 7.

[124] *See id.* at Item N-129, pp. 6, 21.

"natural" food.[125] An industry group commenting on a different provision of the Food Advertising rule submitted "mock-ups" of television ads to support its argument that the disclosures required by the rule were not feasible in broadcast advertising.[126]

Although they were frequently not supported by extensive record documentation, these general comments probably provided useful information for the decisionmakers. Judging from the Commissioner's questions and comments during final consideration of proposed rules, issues relating to the feasibility and effectiveness of alternative remedies were of primary importance as the TRR's took their final shape. However, the absence of record support in many of the "informed" comments meant that some post-record submissions were really just general policy arguments. The question of the distributional effects of a price itemizing requirement, raised in a PRC by the funeral industry's leading expert witness, is an example of a remedial policy argument which should have been supported by an evidentiary foundation in the rulemaking record:

> There might be no objection to increasing the price of the total funeral if all segments of the market were affected equally. Clearly, however, this is not the case. The families who purchase the complete funeral are likely to be from conservative religious groups such as Catholics and Baptists. Also, statistically, families who will continue to buy the complete funeral are more likely to be from middle and low income and education groups and also will be proportionately more from Black families than White. On the other hand, consumer research indicates that the persons most likely to delete funeral services—and therefore benefit from the proposed rule—are families in the 45 to 54 age group, earning over $25,000 a year, renting rather than owning their own home, working in a professional occupation, having a small family, living in a city of over 2,000,000 population and having a post-graduate degree.
>
> If the Commissioners were to promulgate the mandated itemization portion of the proposed rule, the Commissioners will have enacted a rule, whether it be their intent or not, which will benefit high income

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[125] *E.g., id.* at Item N-153, p. 4, where a witness attempted to clarify her definition of "minimal processing" which had been incorported in the staff's revised proposal:

> My objective in defining minimal processing . . . is to limit its scope to only those processes which occur spontaneously or which proceed with only minimal human assistance, using a level of technology available at the most remote frontier and owing nothing to either the industrial revolution of the 19th century or the technological revolution that characterizes our own century. This is not necessarily to reject certain technolog-i-cal improvements. . . .

Another commenter suggested that a food could properly be called "natural" if it had been subjected to processing usually performed in the "simple home kitchen," *id.* at Item N-132.

[126] *See id.* at Item N-135.

> and education consumers by increasing prices to consumers from lower and middle income groups and from conservative religious bodies.[127]

If the Commission had broad policy discretion to frame remedies after concluding that some rule was necessary, there might be little cause for concern when such unsupported policy arguments entered into the agency's final deliberations. However, reviewing courts in the first two Magnuson-Moss TRR's subjected to judicial review seem to interpret the statute as requiring the FTC to show a fairly rigorous logical and factual nexus between the evils identified and the remedies imposed.[128] Under this standard of review,

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[127] Post-Record Comment of Prof. Roger Blackwell, Funeral Practices Proceeding, Sept. 11, 1978, at 2. Consumer groups sometimes made similar policy arguments; *see, e.g.*, Post-Record Comment of Consumer Action of San Francisco in the Vocational Schools Proceeding, *supra* note 119, at 15-16:

> The industry . . . made much of what they consider to be fair to the school owners. But they seemed unable to consider what might be fair to individual students. While it is true that a given school has fixed costs that it must recover, students also have costs that they incur because of attending school. For some it means giving up a job in order to attend school full time; for others, placing their children in private child care or school facilities in order to go to vocational school.

[128] American Optometric Ass'n v. FTC, No. 78-1461 (D.C. Cir. Feb. 6, 1980) (slip op. at 33-34), reversing major portions of the Ophthalmic Goods TRR:

> The second [justification for remand] has to do with the adequacy of the evidence the Commission has adduced to support its rule. The Commission has amassed, and we have surveyed, considerable evidence to show that a total ban on the advertising of ophthalmic goods and services adversely affects the quality of information available to consumers . . . and that it tends to cause the prices of those goods and services to rise. However, a total ban on advertising is precisely what *Bates [v. State Bar of Arizona,* 433 U.S. 350 (1977),] forbids and none of the parties to this proceeding suggests that a total ban is any longer permissible.
>
> In contrast, there is almost no evidence, only speculation, as to what have since *Bates*, become the genuinely controversial aspects of the Commission's rule. . . .
>
> There is scant evidence to support the Commission's apparent conclusion that states will, if permitted, abuse the power to require affirmative disclosures in ophthalmic advertising. . . .

In a footnote, the court disposed of the FTC's contentition that the Magnuson-Moss Act gave it broad remedial discretion to impose "fencing-in" provisions for the purpose of preventing unfair or deceptive practices:

> The Commission suggests that its discretion to formulate "appropriate means of providing [*sic*; should be "preventing"?] the unfair practices found to exist is necessarily even greater in rulemaking . . ." than when it prescribes remedies in adjudication. Whether this is so we cannot now say. But in any event, the Commission does not and cannot contend that there are circumstances in which the "reasonable relationship" between the offense and the remedy need not exist.

Id. at 33-34 n. 8. The Second Circuit's decision reversing the Vocational Schools TRR has similar language. *See, e.g.*, Katharine Gibbs School, Inc. v. FTC, *supra* note 34, at 664: "This Court is obligated to take a close look at what the Commission has done and to determine whether it has articulated a 'rational connection between the facts found and the choice made.' . . . We have taken a close look, and we find no rational connection between the Commission's universally applicable refund requirements and the prevention of specifically described unfair and deceptive enrollment practices."

PRC's which make policy arguments without record support may simply tempt the Commission to commit reversible error.

Some of the informed post-record commenters did cite and discuss specific record evidence in support of their arguments. As previously mentioned, a few witnesses who had testified at the hearings took issue with the way that the staff's or the Presiding Officer's report had cited their statements; in effect, they were rebutting the uses made of their testimony.[129] Other commenters offered more general critiques of the nature or quality of the evidence relied on in the reports. One participant in the Food Advertising hearings took umbrage at what he called the Presiding Officer's "equal time for nonsense" approach, in which the testimony of "a world-famous discoverer of trace elements in plant nutrition and a member of the National Academy of Sciences" was given less weight than the testimony of the publisher of an organic gardening magazine who was merely "a journalist" and had "no expertise."[130] Group representatives in that proceeding used a similar tactic to discredit staff's support for its recommendation that ads for "energy" foods be required to disclose calorie content. Staff had relied upon the testimony of doctors and psychiatrists in concluding that the information would be important to obese consumers:

> The harsh reality is that psychiatrists are not, in fact, successful even in their own efforts in treating obesity.
>
> Testimony of the medical witnesses is grossly inadequate to prove causation of obesity by food energy advertising, hence to support any rule, since their opinions were subjective judgments, based upon personal involvement with only a statistically nonrepresentative, small, distinct, and discrete sub-group of the population; not the whole consumer population; not the whole obese population or a true representation thereof; not the obese population which handles, or chooses not to handle, its problem without a doctor.[131]

Occasionally, commenters' efforts to undermine the staff's support for its recommendations took the form of allegations that the staff's summary of the evidence was biased or unfair. One of the industry representatives in Vocational Schools charged that the staff had used "several tactics of selection, distortion and omission of evidence."[132] Its elaboration of this point suggested that there was a fundamental difference between staff and industry with respect to the proper analysis of evidence in trade regulation rulemaking. The industry commenters complained that staff "failed or deliberately chose not to obtain any quantitative information as to the percentage of schools or students involved in abusive practices."[133] In their view, staff had looked only to see whether the abuses in the industry had crossed some low, absolute threshold rather than considering the relative proportions of satisfied and disatisfied consumers, or honest and dishonest schools.[134] This comment raised an important generic proof issue which is likely to arise in other TRR proceedings; but the Commission did not clearly address the issue.[135]

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[129] *See* note 119, *supra*, and accompanying text.

[130] Post-Record Comment of Dr. Thomas Jukes, Food Advertising Proceeding, Item N-126.

[131] Post-Record Comment of the Association of National Advertisers in the Food Advertising Proceeding at IV-27. *See also* PRC's of the Grocery Manufacturers Association N-155 at 40-41, and of Lever Brothers, N-135 at 7-8, for similar critiques in the Food Advertising proceeding.

[132] Post-Record Comment of LaSalle Extension University at 8.

Finally, a few of the post-record comments presented a systematic, comprehensive critique of the record evidence. Typically, two or three major group representatives in a proceeding would file detailed comments of this nature. These submissions often rivaled the staff report in length, and contained a broad spectrum of factual, legal, and policy arguments.[136] Like the staff reports, these major PRC's were so detailed and lengthy that it is difficult to believe that the top agency decision-makers could develop a working mastery of them in the time available. Thus, their primary function may be to lay a foundation for judicial review, or to convince the Commissioners by a literal "weight of the evidence" that the commenter's position is supportable on the record.

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[133] *Id.* at 10.

[134] *See id.* at 8-9:

> At the outset of the staff made exhaustive efforts to collect stories of consumer abuses, while ignoring and actually discouraging evidence and testimony that schools were educationally and ethically sound. The staff relies on testimony from unethical salesmen and dissatisfied students, while totally omitting mention of evidence from ethical salesmen and statisfied students, whether in the form of individual testimony and statements or statistical surveys. The report relies on testimony from consumer protection and prosecuting officials, who necessarily come in contact with only those schools and those actions of schools that give rise to consumer complaints, while ignoring testimony from education officials and experts as to the overall performance of proprietary schools. A great part of the evidence cited in the report consists of anonymous letters, unadjudicated complaints of the FTC and others, newspaper and magazine "exposes," and materials not in the record.

[135] An ambiguous passage in the final statement of basis and purpose seems to resolve the issue in the staff's favor, without explicitly discussing the question of proof thresholds and the relationship between scope of abuses and the remedy imposed. After reciting that judgments about the prevalence of prohibited acts or practices must be based on consideration of all record evidence which might be relevant, 43 Fed. Reg. 60803 (Dec. 28, 1978), the statement observes:

> Given the multiplicity of students and schools involved in this industry and the millions of individual school-student contacts which occur, it is extraordinarily difficult, and probably impossible to make any precise quantitative assessment of the frequency of the practices at issues. . . . Nevertheless, prior Commission involvement with proprietary vocational schools clearly demonstrates the continuing nature of the problem in the industry. In 1972 the Commission published guides for proprietary vocational schools . . . Yet, since 1972, the Commission has issued 22 complaints or consent decrees involving industry schools. While the Commission would prefer harder numbers . . . , the issues of prevalence does not lend itself to precise quantification.

Id. After this cursory analysis, the statement simply concludes: "On the basis of the record here, the Commission is convinced that large, though not precisely ascertainable, numbers of students are affected by these practices, and that this number represents a significant number of all school-student interactions." *Id.* Clearly, the Commission is attempting to maximize its discretion and to keep the proof requirements as low as possible.

Since very few rules had reached the stage of final passage during the period covered by this study, it is difficult to generalize about the utility of the PRC's or their impact on the ultimate decisions. However, one point does seem clear: the post-record comments could have been more useful to both the decision-makers and the participants if they had been focused or informed by some feedback from the Commissioners. Through four successive procedural stages—prehearing comments, hearing testimony, rebuttal, and post-record comments—interested persons were given open-ended, loosely structured opportunities to submit data, views and arguments. However, since the Commissioners had remained isolated from the developing record throughout this period, there was no assurance that they would view the issues in the same way as the participants, or that interested persons were channeling their efforts in the most fruitful directions. As discussed in the following section, the Commission did begin to provide some guidance for participants in its more recent notices of oral presentations. However, the limited time, limited participation, and oral format of the presentations made it impossible to explore all of the important issues in depth. If the Commission is to keep the basic structure of posthearing procedures outlined in the Rules of Practice, it could get more benefit from the final round of comments by becoming involved in the substantive issues at an earlier stage, so that the final comments can be directed toward matters that are crucial to the final decision.

(c) Oral Presentations

The original Rules of Practice under the Magnuson-Moss Act did not provide for oral argument before the full Commission. However, after the

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[136] The page lengths of some major PRC's are as follows: *Care Labeling*—Carpet & Rug Institute (63 pages); *Food Advertising*—Ass'n of National Advertisers (approx. 300 pages); Grocery Mfrs. of America (70 pages); Hershey Foods, Inc. (85 pages); *Funeral Practices*—Nat'l Funeral Directors Ass'n (610 pages, excluding appendices); Nat'l Selected Morticians (261 pages); Joint Consumer Group PRC (91 pages); *Hearing Aids*—Nat'l Hearing Aid Society (288 pages, excluding appendices); Hearing Industries Ass'n (1,902 pages, excluding appendices); *Ophthalmic Goods*—American Optometric Ass'n (126 pages); Joint Consumer Group Comment (74 pages); *Vocational Schools*—LaSalle Extension University (244 pages); Ass'n of Independent Colleges and Schools (122 pages); Nat'l Home Study Council (136 pages).

Home Box Office decision[137] led to the prohibition of *ex parte* contacts between Commissioners and outside parties, the FTC decided to provide a formal channel of access by scheduling "oral presentations" before final deliberations.[138] The Rules of Practice adopted by the Commission do not provide much detail about the function and structure of these presentations,[139] but the language of the relevant provision does reflect concern that the oral presentations might be used to undermine prior stages of the rulemaking process. Thus, in order to prevent interested persons from "sandbagging" the evidentiary hearing and saving their key evidence for the Commissioners, the Rules instruct the participants to base their remarks on materials already included in the record.[140] The procedural regulations also provide that the right to make an oral presentation is confined to persons who had previously participated in the rulemaking,[141] but this does not exclude organizations or individuals who were not designated group representatives.[142] In practice, the Commission has sought a broad spectrum of viewpoints in the oral presentations, subject to the practical constraints of time and workload.[143]

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[137] Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 829 (1978); *see also* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

[138] The Commission's ban on *ex parte* communications was first published without any provision for oral presentations, and FTC Chairman Collier dissented from the adoption of the rule, stating:

> I have no quarrel with controlling communications to Commissioners during the course of rulemaking proceedings. The failure to do so can render our orderly procedures for accumulating relevant information and views a nullity if not a charade. But I object to an absolute ban on such communications . . . unless and until the Commission establishes a proper forum for receipt of oral presentations.

42 Fed. Reg. 43973, 43974 (Sept. 1, 1977). Commissioner Collier's recommendation that a presumption favoring oral presentations be created was adopted in a revised rule governing *ex parte* communications, published less than two months later. 42 Fed. Reg. 60561 (Nov. 28, 1977.) The total ban on *ex parte* communications was rescinded later, following an assessment of the experience under the rule. *See* note 37, *supra.*

The FTC's decision to allow oral presentations before the Commissioners followed several industry spokesmen's request for such an opportunity in the Vocational Schools proceeding. *See, e.g.,* Application for the Prohibition of Ex Parte Communications with the Rulemaking Staff and for Other Relief, by the Association of Independent Colleges and Schools, Jan. 26, 1977.

[139] The FTC's Rules of Practice state that:

> [T]he Commission may allow persons who have previously participated in the proceeding to make oral presentations to the Commission, unless it determines . . . that such presentations would not significantly assist it in its deliberations. Presentation shall be confined to information already in the rulemaking record. Requests to participate in an oral presentation must be received by the Commission no later than the close of the [post record] comment period under § 1.13(h). The identity of the participants and the format of such presentations will be announced thereafter.

16 C.F.R. § 1.13(i) (1980). Despite the suggestion in the Rules of Practice that oral presentations will not be routinely scheduled, such presentations were held in every Magnuson-Moss proceeding to reach that stage by June 1, 1980. The proceedings and the dates of notice of oral presentations are as follows: Ophthalmic Goods (no Federal register notice published); Vocational Schools, 42 Fed. Reg. 62496 (Dec. 13, 1977); R-Value, 43 Fed. Reg. 51038 (Nov. 2, 1978); Funeral Practices, 44 Fed. Reg. 10993 (Feb. 26, 1979); Care Labeling, 44 Fed. Reg. 38570 (July 2, 1979), supplemented at 44 Fed. Reg. 40523 (July 11, 1979); Holder in Due Course, 44 Fed. Reg. 34153 (June 14, 1979), rescheduled at 44 Fed. Reg. 48708 (Aug. 20, 1979); Used Cars, 44 Fed. Reg. 48708 (Aug. 20, 1979); Hearing Aids, 44 Fed. Reg. 51992 (Sept. 6, 1979); and Food Advertising, 45 Fed. Reg. 27453 (Apr. 23, 1980).

While the Commission moved promptly to institutionalize the practice of holding oral presentations, its attempts to clarify the structure and functions of the presentations progressed more slowly. Evidently a major objective in the beginning was to keep the sessions as informal as possible, by encouraging candid interchanges in a "round-table" format rather than adopting the more formal conventions of a legal oral argument.[144] Thus, in the early proceedings, the Commission gave the participants broad latitude to make whatever sort of presentation they wished, within the fixed allocation of time. By mid-1979, when the Care Labeling rule reached the Commission, the Federal Register notices and the informal invitations sent to potential participants, had begun to enumerate issues which the Commission wanted the participants to address in their oral presentations.[145] However, these limitations were not mandatory, and the Commission gave the participants little guidance as to the manner in which issues should be addressed. As a result, the oral presentations remained fairly unstructured, and participants were free to adopt divergent strategies. Some presented again testimony that had been given earlier at the hearings; some brought political or constituency-group leaders to deliver statements of support or opposition; some followed the tradition of legal oral arguments, and advocated matters of fact, law, or policy; and some tried to negotiate settlements.[146]

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[140] *See* 16 C.F.R. § 1.13(i) (1980), *supra* note 139.

[141] *Id.*

[142] One possible reason for not limiting the right of oral presentation to the group representatives is the likelihood that such a limitation would increase the number of interests seeking to be designated as group representatives, which could make it more difficult for the Presiding Officer to keep the number of designated representatives—and the hearings—within reasonable bounds. In addition, limiting the oral presentations to group representatives might have excluded some helpful participants, such as government agency representatives or small business and consumer group spokesmen, who lacked the interest or resources to become a group representative.

[143] Typically, the Commissioners hold one or two days of oral preentations, and permit each participant 20 to 40 minutes for his or her presentation. Given the Commissioners' workloads and the difficulties of scheduling large blocks of their time, it would probably be very difficult for the Commissioners to devote more time to hearing oral presentations. In any event, there was no indication that significant interests or viewpoints were excluded from the oral presentations during the period covered by this study. *See generally* Federal Register notices, *supra* note 139, for lists of the participants. A breakdown by constituency categories of the persons making oral presentations in the "core" proceedings is set forth in Appendix A to this report. In a few instances, persons representing very narrow interests, or interests already represented by others selected to make oral presentations, were denied the opportunity to appear before the Commission.

[144] For example, the FTC Chairman announced at the start of the first oral presentation under the Magnuson-Moss Act that the session had been scheduled in the Commission's meeting room rather than in one of the formal hearing rooms because the Commissioners wanted an informal exchange at which people could "roll up their sleeves" and aggressively argue their positions. Observation Report of Oral Presentation in the Ophthalmic Goods Proceeding, Dec. 7, 1977.

Regardless of the form they took, the oral presentations seemed to have some value for the participants and the Commissioners. Even the participants who simply reiterated points that they had made in earlier stages of the proceeding were able to emphasize the matters they considered most important,[147] and to have the satisfaction of speaking directly to the people who would make the final decision. Interest group representatives were able to express their preferences for particular regulatory alternatives,[148] and to respond to the Commissioners' apparent concerns. The opportunity to make a final oral statement was particularly important in situations where staff recommendations changed after the submission of post-record comments. This happened with some frequency in the proceedings studied, partly as a result of staff turnover. When it did, the oral presentations were the participants' only real opportunity to comment on the near-final TRR.[149]

The Commissioners also used the oral presentations for a variety of purposes. As in an adjudicative oral argument, they could probe for weaknesses or inconsistencies in the advocates' reasoning,[150] or ask the participants to respond to the Commissioner's legal or policy analysis.[151] The fact that the advocates had to select their best arguments and make their principal points under tight time deadlines also seemed to give the Commissioners some sense of the relative importance of different issues. At the same time, however, the brief time allotted to the speakers created some risk that key points would be overlooked or misstated. A four-year proceeding which has generated a record of more than a hundred thousand pages is not easy to summarize in twenty minutes or a half hour of oral exchanges, particularly when the hearing panel is not fully familiar with the many technical, legal and policy issues raised by a proposed TRR. In this context, fortuitous matters such as the sequence in which the participants are scheduled to speak,[152] the advocacy skills of the representatives,[153] and the nature of the questions asked by the Commissioners may greatly affect the cogency of the oral presentation.

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[145] *See, e.g.,* Supplemental Notice Concerning Oral Presentations in the Care Labeling Amendment Proceeding, 44 Fed. Reg. 40523 (July 11, 1979).

[146] For example, all of these approaches were used by various participants in the Vocational Schools TRR. Observation Reports of Oral Presentations in the Vocational Schools Proceeding, January 12, 1978.

[147] The oral presentation in the Hearing Aids TRR proceedings is noteworthy—if not unique—in the efforts that the participants made to emphasize record evidence. Both major industry representatives went to great lengths to direct the Commissioners' attention to particular items of evidence. *See, e.g.,* Transcript of Oral Presentations in the Hearing Aids Proceeding at 39 ff. (presentation of the National Hearing Aid Society) and 101 ff. (presentation of the Hearing Industries Ass'n.).

[148] *See, e.g.,* Transcript of Oral Presentations in Vocational Schools at 19–31 (industry participant presents a joint industry proposal for provisions it could live with); Observation Report of Oral Presentation in Ophthalmic Goods Proceeding, Dec. 7, 1977 (consumer group spokesmen argues successfully for inclusion of additional remedial provisions).

[149] *See* Appendix I for frequency of staff revisions. In the R-Value proceeding, several participants in the oral presentations complained of the short time available for them to respond to revised staff and Bureau recommendations. Transcript of Oral Presentations in the R-Value Proceeding at 19 (Environmental Group); at 37 (Borden, Inc.); at 67–68 (National Mineral Wool Insulation Ass'n; at 81 (National Consumers League); and at 102 (Aluminum Ass'n, Inc.).

While the oral presentations were usually successful in highlighting the major legal and policy arguments, they were generally less helpful in illuminating factual disputes or exploring compromise solutions. The Commissioners' willingness and ability to pin down factual issues during the oral presentations varied among Commissioners and across different proceedings, but in most instances the discussion of factual issues did not seem very penetrating or useful. Often, the Commissioners' factual probes were simple inquiries as to whether the record supported a particular position or outcome; the participants' answers were sometimes equally vague and general.[154] It was rare for a participant to be able to cite specific evidence supporting an assertion, much less to provide a concise assessment of the positive and negative evidence on a particular point.[155] As one consumer representative put it:

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[150] *See, e.g.,* R-Value Oral Presentation Transcript at 23 (questioning of Environmental Group spokesman); Funeral Practices Oral Presentation Transcript at 250–254 (questioning of consumer-advocate); Hearing Aids Oral Presentation Transcript at 69–70 (questioning of dealer spokesman); Used Cars Oral Presentation Transcript at 61–65 and 191–195 (questioning of consumer-advocates).

[151] *See, e.g.,* Holder in Due Course Oral Presentation Transcript at 100–102 (Commissioner Dixon discusses "prevalence" showing); Funeral Practices Oral Presentation Transcript at 54–55, 225–228 (Commissioner Pitofsky explores possibility of "package pricing" in addition to "itemization"); Vocational Schools Oral Presentation Transcript at 62–64 (Commissioner Clanton discusses "prevalence" burden and remedial authority).

[152] For example, the fourteenth participant in the Funeral Practices TRR presentations would have a much clearer idea of the issues which were troubling the Commissioners than the early speakers by virtue of his ability to observe the discussions. Of course, there may well be a countervailing boredom or fatigue factor which makes the Commissioners less attentive to the last speakers.

[153] The courtroom maxim that cases are lost rather than won on oral argument seems equally applicable to trade regulation rulemaking, though occasionally a strong affirmative presentation seemed to sway the Commissioners. *E.g.,* Interview FTC Chairman Pertschuk, December 6, 1978. As observed at the evidentiary hearings (*see* ACUS Phase I Report), advocacy skills were highly vairable, and some of the participants were much more articulate and effective than others. However, it should be noted that most of the major interests or positions were represented by multiple spokesmen; thus, if one advocate made a poor showing, it was likely that another representative of a similar viewpoint would make the points more effectively.

> There have been questions about what the record shows and what the record doesn't show. The record at this point consists of some 45,000 pages. If we had brought copies here, it would cover the table and possibly obscure most of us. There's no way in this kind of hearing that I can point to specifics in the record, nor can most of the people here claim to have read the entire record.
>
> What I can say is that I sat through one set of these hearings, have read substantial portions of the record, ... have read the several documents that summarize the record of the testimony, and in many ways we have to rely on those.[156]

In short, the overwhelming bulk of the record, and the practical difficulties of getting access to it,[157] generally prevented both the Commissioners and the participants from dealing with factual disputes in any detail during the oral presentations. The FTC's apparent assumption that evidentiary standards were loose and flexible, and that a relatively low level of proof was needed to support a TRR, may also have contributed to the lack of detailed factual probing during the oral presentations.[158] In most of the oral presentations observed during this study, the Commissioners' attention was focused primarily on matters of remedy—whether particular rule provisions were necessary, or were likely to be effective, or were tolerable to the regulated industry. Some of the Commissioners developed recurrent lines of questioning on remedial issues,[159] and the Commissioners generally seemed to have serious concern about the quality of the evidence bearing on the efficacy of the rule provisions. However, the staff and outside participants had not fully anticipated the Commissioners' interest in proof relating to remedies, and as a result the evidentiary hearings had been primarily focused on proving the existence of abuses, or more peripheral matters.

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[154] *See, e.g.,* Transcript of Oral Presentation in Vocational Schools Proceeding at 21-22, where a spokesman for the industry is urging the FTC "not to experiment with the untried staff refund formula":

> Commissioner DIXON. Is there anything in the record that would indicate why the rule such as has been proposed here—
>
> . . . . .
>
> [COUNSEL FOR THE TRADE ASSOCIATION]. Let me answer you in terms of what is in the record. There were many school witnesses who testified that their costs didn't run proportionately to the number of lessons completed, that they had various [kinds] of up-front costs, development costs, even servicing the lessons was different. There was also—we know that the Commission at one point started a survey . . . to determine if there was a basis for a refund policy. That survey was never put into the record, and we would like to know what it shows.

See also Transcript of Funeral Practices Oral Presentation at 21-22, where a consumer group representative is responding to a Commissioner's inquiry about the "quality of evidence" in the record regarding experience in states which required price itemizing similar to that which would be mandated by the proposed rule:

> I would prefer that we had a highly detailed analysis. To my knowledge—and I am not familiar with the record—I don't know all the things included in it—to what extent this subject has been gone over in detail with respect to the various studies cited.
>
> So what you define as "on the record," I am really not capable of responding to it. . . . I suppose the most simple response to this . . . is: Lee Funeral Home down on the corner a mile away will offer you a funeral for $525. They have itemized prices that don't drive out low-priced funerals.

[155] As previously noted, the Hearing Aids proceeding was an exception in this regard; *see* note 147, *supra.*

[156] Transcript of Oral Presentation in Funeral Practices Proceeding 208.

[157] *See* the discussion of the rulemaking record in ACUS Phase I Report, Chapter III.

While the oral presentations could not remedy these gaps and deficiencies in the record with respect to remedies, they also failed to provide a setting in which the possibilities for compromise solutions could be explored. Occasionally, industry groups professed willingness to seek a compromise settlement in the course of their oral presentations. The first offer was made in the Vocational Schools proceeding, where some of the participating schools offered a plan "to resolve this proceeding in a way that is acceptable to the school and that the school can live with."[160] Immediately, the Commissioners began to see procedural problems in conducting settlement negotiations in the midst of a judicialized proceeding. The Chairman foresaw notice objections if the agency considered proposals which "were not subject . . . to scrutiny by the staff or other participants."[161] The industry spokesman assured him that the substance of the proposals had been adequately revealed during the prior stages of the process. However, the Chairman still had considerable difficulty fitting a settlement offer into the mold of a decision which was supposed to be based upon substantial evidence:

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[158] *See* notes 128, 132-35, *supra*, and accompanying text. However, the hostile reception which its TRR's have received on judicial review and in Congress may be forcing the FTC to think more carefully about matters of evidence and record support. In responding to the charge leveled by a departing FTC official that "an air of calculating caution has spread within the commission," Chairman Pertschuk reportedly denied that the Commission was "ducking cases," while conceding that the Commissioners have become more demanding of the staff and require more evidence and stronger analysis before taking action. *The Washington Post,* D7, Col. 4 (May 28, 1980).

[159] Commissioner Clanton was particular active in questioning representatives about what the record showed the experience had been in states which had imposed requirements similar to the proposed rule provisions. *See, e.g.,* Transcript of Oral Presentation in Vocational Schools Proceeding 90; Transcript of Oral Presentation in Funeral Practices Proceeding 20–22; Transcript of Oral Presentation in Hearing Aids Proceeding 72. Other Commissioners also asked similar questions: *see* Transcript of Oral Presentations in Holder In Due Course Proceeding 79 (Commissioner Dixon); Transcript of Oral Presentation in Hearing Aids Proceeding (Chairman Pertschuk).

[160] Transcript of Oral presentation in Vocational Schools Proceeding at 148.

[161] *Id.*

> I am not trying to trap you into saying that the record supports this proposed settlement but I am trying to put this in a posture where we can deal with it. Let me express some ill ease that at an oral presentation which is designed to wrap up a proceeding we should be called upon to consider a proposal which in appearance is a new proposal . . . . I intend to treat it . . . as your argument as the most that the record can support in terms of regulation. . . [162]

Sensing that he was being led into a damaging concession, the proponent of the settlement offer retreated, saying: "We are certainly not convinced and we don't take the position here today that the factual record or your statutory authority permits these measures; however . . . we do take the position that if these proposals as a package . . . were promulgated we would not challenge the proper legal and factual basis for that."[163] Settlement negotiations did not progress beyond this point, and the schools which had made the offer later participated in the successful court challenge to the final rule. The other settlement offer, which was made in the Funeral Practices proceeding,[164] apparently met the same fate. Despite the Commission's efforts to keep the presentations informal and candid, they were still more like an oral argument in a judicial proceeding than a bargaining session. Both the procedural structure (a public, on-the-record hearing with participants allocated a limited time period to make their arguments) and the substantive requirements (the need to have a reasoned decision based on substantial evidence in the record) inhibited the search for a workable compromise.

In short, the oral presentations reflected some of the underlying problems in the trade regulation rulemaking process. For the rules which reached the stage of final action during the period covered by this study, the elaborate fact-finding proceedings that preceded the Commission's deliberations did not really seem to confine agency discretion. Given the lax proof standards which the Commission used, the records were sufficiently massive to justify any outcome the Commissioners might select; and, in any event, the factual materials in those records often appeared to be inaccessible and not very useful in deciding the major remedial issues. Moreover, the Commissioners' lack of involvement in the developing issues until the very end stages of the process made it difficult for them to master the issues and evidence, and for the participants to foresee what factors would shape the decisions on the rule. Finally, the adversary structure and the requirement of a publicly explained, record-supported decision undermined, if not prevented, the search for workable compromise solutions.

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[162] *Id.* at 149.

[163] *Id.* at 150.

[164] *See* Transcript of Oral Presentations in the Funeral Practices Proceeding 51–55. The treatment of the Funeral Practices offer differed in that one of the Commissioners appeared willing to negotiate with the industry over the terms of a voluntary settlement, *see id.* at 53–54, and also in the objections to the settlement proposal made by a consumer representative during the oral presentations, *id.* at 182–183.

(d) The Statement of Basis and Purpose

In theory, a rulemaking statement of basis and purpose can be designed to serve several different functions, and to address different audiences. The statement could be designed as a technical explanation of the decision, directed primarily at reviewing courts and at the various expert and professional communities that will critique regulatory policies. Alternatively, it might be styled as a lay-language summary of what the rule does and why, aimed at the regulated industry and other affected interest groups. The statement could have an internal guidance function, as well; it might serve as an authoritative directive to staff (and to outside lawyers in future proceedings) of the agency's position on matters of legal theory, evidence, procedure, and regulatory policy. Each of these purposes implies a somewhat different style and content for the statement. The drafters of a statement of basis and purpose also have to resolve the tension between explaining the decision and justifying it—that is, of providing an analytical summary of the process of decision-making, or of drafting an advocacy document that will persuade oversight bodies and constituency groups of the propriety of the result.

The legislative history of the Magnuson-Moss Act provides relatively little guidance as to how the FTC should choose among these various objectives. There is language in the statute and the committee reports suggesting that the statement is intended primarily as a lay-language summary rather than a technical analysis.[165] However, this types of statement seems anomalous in light of the elaborate fact-testing process that precedes it and the substantial-evidence judicial review that follows.[166]

In practice, the FTC's statements seemed to be written with primary concern for judicial review, and they tended to be more a defense of the decision than an analysis of it. To some degree, this emphasis may have resulted from the fact that the Commission assigned the rulemaking staff attorneys to draft the statement after the key policy decisions had been made in open Commission meetings. Not surprisingly, the staff tended to follow the organization and methods of analysis that they had earlier used in their final staff reports; the statements are generally compressed versions of the staff reports, with large portions incorporated by reference.

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[165] *See* H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 47 (1974); H. R. Rep. No. 93-1606, 93d Cong., 2d Sess. 32 (1974).

[166] The statute is even more confusing in that the "rulemaking record" is defined to include the statement of basis and purpose, yet the statute expressly declares the statement to *not* be subject to judicial review. This inconsistency was discussed by a panel of the Court of Appeals for the D.C. Circuit in deciding the appeal of the Ophthalmic Goods TRR. American Optometric Association v. F.T.C., No. 78-1687 (D.C. Cir. Feb. 6, 1980) (Slip. Op. at 21-23). The Court decided to "resolve the conflicting commands of the statute by consulting the statement of basis and purpose where the statement is helpful in understanding the Commission's reasoning, but, nevertheless, being careful not to impose upon the statement the unreasonable demands about which Congress was concerned." *Id.* at 24.

This approach to the drafting of the statements had several disadvantages, First, it was likely to feed the perceptions of the rule opponents that an adversary staff really controlled the process, and that the Commission did not give serious attention to objections or criticisms.[167] It also tended to make the statement fairly remote from the actual process of decision that went on within the Commission. The statements would vary from the staff report to the extent necessary to dispose of major issues debated by the Commissioners, but they would not really track the process of decision-making in the way that a well-developed "cogent comment" process would. The fact that the statement was drafted by the staff and simply ratified by the Commission also made it unlikely that the statements would be used to establish evidentiary standards or give guidance to future rulemaking staffs. Rather, a rulemaking staff preparing a statement would tend to adopt broad, flexible and discretionary proof standards, in the hope of convincing a reviewing court that the record contained sufficient factual support for the rule.

An alternative model of statement-drafting could be derived from the "cogent comment" practices used by some agencies. In this approach, the agency deliberations and the final statements would both be structured around responses to the major substantive issues raised by written comments are other submissions. The "decision document" presented to the agency heads would include not only a summary of the criticisms and objections raised by participants, but also a responsive analysis and a proposal either to accept or reject the suggested changes. Deliberations would involve a systematic consideration of the positions and rationales presented, and the final statement would set forth in some detail the decision made by the Commission on each of the major points.[168]

At least some Commission officials feel that the current process provides the functional equivalent of a "cogent comment" approach, because objections which are not anticipated in the staff report are likely to be addressed in the Bureau Director's memorandum and the responsive memo submitted by the staff.[169] One point that should be noted is the lack of uniform practice regarding these final memoranda. The policy of having the staff prepare revised recommendations after review of the post-record comments evidently did not evolve until after the first two rules had been issued under the Magnuson-Moss Act. Even after the responsive memos became a regular feature of trade regulation rulemaking, they tended to vary in style and substance from one rule to the next. In some instances, they were concerned almost exclusively with issues of FTC regulatory policy, such as the preference for market incentives over "command-and-control" regulations, rather than addressing specific points made by outside parties. Over the course of time, the process will probably become more standardized. As it does, there may be some advantages in shifting it more toward the "cogent comment" model. If the final memos are required to contain a systematic analysis accepting or rejecting the prinicipal points raised by outside parties, it is less likely that the Commission will ignore or dismiss too quickly substantial points made by rule-opponents.[170] In addition, if these memos were used in drafting the statement of basis and purpose, that document could become a more useful guide to the Commission's thinking and a more accurate reflection of the actual decision-making process. By carefully considering all of the significant points raised in opposition to the proposed rule, a statement of this type could contribute to the appearance of rationality and fairness in trade regulation rulemaking, and perhaps to the realit as well.

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[167] *See, e.g.*, argument of Katharine Gibbs School on appeal of the Vocational Schools TRR, Brief of Katharine Gibbs School, *supra* note *34*, at 32–33, 37.

[168] For an example of the use of a "cogent comment" approach in procedural rulemaking, *see* the Food and Drug Administration's statement accompanying the agency's regulations on compensation of participants in agency proceedings, 44 Fed. Reg. 59174–85 (Oct. 12, 1979). The Environmental Protection Agency also uses this approach in its substantive rulemaking; *see, e.g.*, Appendix A-Significant Comments and Responses, in Final Rule on Inventory Reporting Requirements under the Toxic Substances Control Act, 42 Fed. Reg. 64572, 64580–93 (Dec. 23, 1977).

(e) General Observations

Viewing the posthearing procedures as a whole, they incorporate at least the outlines of an adversary process following after an investigative stage. That is, the public proceedings from first comment period through oral evidentiary hearings and rebuttal seemed in practice to serve as an unconfined information-gathering process in which interested persons and staff were free to submit any materials or information which they considered relevant to the problems under consideration. From that point onward, the procedure broadly followed the outline of an adversary process:

> *Direct Presentations:* Staff prepares its final report and recommendations, constituting its "case-in-chief" for the proposed rule.

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[169] Interview with Albert Kramer, Director, Bureau of Consumer Protection, FTC, Nov. 19, 1979.

[170] The burden on the FTC's resources if it undertook a systematic analysis of and response to cogent comments should not be particularly great, inasmuch as the staff already prepares a comprehensive summary of the principal arguments and comments. *See* discussion *supra* at note 114B.

Rebuttal: Interested persons submit post-record comments taking issue with the staff's "case".

Re-Direct: Staff submits its responsive memorandum and revised recommendations.

Surrebuttal: Interested persons make oral presentations to the Commission.

Many of the procedural problems arising in the posthearing phases may have resulted from the fact that this structure was not clearly communicated to outside participants, or strictly enforced by the FTC; as a result, there was some degree of confusion as to what was supposed to be happening at each of these procedural states.[171] There were also fundamental differences of opinion between the agency and some of the outside participants on the question of whether this approach was consistent with the statute. In general, the rule-opponents took the position that the process for reaching joinder of issue and providing a clear statement of the staff's "case" should have taken place earlier, before the evidentiary hearing. This latter timing question implies a more fundamental issue of when, and to what degree, the agency's substantive decision should be structured or confined in hybrid rulemaking.

2. THE NATURE AND TIMING OF SUBSTANTIVE STRUCTURING

In considering the substantive constraints on the FTC's rulemaking decisions, it may be useful to compare three models of decision-making that could be applied to administrative rulemaking.

(a) Prior Structuring

General rules of decision could be clearly established before a proceeding begins, either in detailed statutory standards or in agency rules and precedents. This substantive structuring could be technical in nature, involving the adoption of scientific standards of inquiry and validation; or it could be legal structuring, specifying the elements of a cause of action and the applicable rules of evidence. The FDA's drug efficacy determinations are an example of technical structuring, in which the agency is required to make its decision on the basis of "adequate, well-controlled clinical studies."[172] An example of relatively detailed legal structuring can be found in the warranty rulemaking provisions of Title I of the Magnuson-Moss Act.[173] Functionally, this kind of decision-making resembles an adjudication: the purpose of the proceedings is to determine whether a set of facts exists which satisfies the conditions described in the substantive standards.

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[171] This confusion was especially apparent during the R-Value oral presentations on November 21, 1978. Speaker after speaker objected to insufficient time to analyze and respond to changes in the rule recommended by the staff, in a memorandum dated Nov. 3, 1978, and the Bureau Director, in a memorandum dated Nov. 9, 1978. *See* note 149 *supra*, and Appendix I, which shows the dates of posthearing events.

[172] *See* ACUS Phase I Report, Chapter III, text accompanying notes 28–32.

[173] 15 U.S.C. § 2301*et seq.* (1976).

(b) Post Hoc Structuring

At the opposite extreme from prior structuring is a decision-making process in which the public proceedings are purely educational or investigatory, and relevant factors or rules of decision emerge only at the very end of the process, when agency officials attempt to distill a policy from the information that has been gathered. In some instances, at least, this is the model of "classical" notice-and-comment rulemaking under a broad delegation of discretionary power.

(c) Intermediate Structuring

One sense in which a rulemaking proceeding can be "hybrid" or fall between the two polar models is to have the substantive and evidentiary constraints on the agency's decision crystallize at some mid-point in the public proceedings. Part One of this Report sought to describe one such intermediate model by use of the "funnel" metaphor. The assumption was that it should be possible, and under this statute it would be desirable, for the agency to define precisely the legal, technical, and factual constraints on its decision before it provided an opportunity for a trial-type hearing. Thus, while the early stages of the process might be relatively informal and free-form, the agency should make a continuing effort, reinforced by realistic procedural checkpoints, to narrow and define the key matters in dispute.

Each of these three models implies somewhat different standards for administrative procedure, evidentiary support, and judicial review. In a prior-structured process, it becomes possible to identify a small cluster of issues in dispute, and to exclude others through a summary judgment approach. As a result, an adversary format, perhaps even a trial-type hearing, becomes practicable. The proponent of a rule or order will be able to present a case-in-chief, and the opponent will be able to contest it, because both will have fairly clear understanding of what is relevant and what has probative value. The resulting record should be organized in such a way, and contain a sufficient level of factual detail, to support fairly intensive scrutiny on judicial review.

By contrast, a process that is not structured or bounded until the ultimate stages cannot be readily fitted into a formal adversary process because there will be on consensus as to what constitutes the case-in-chief, what evidence will be determinative, or who has the burden of proof on particular issues. Without adequate structuring, a trial-type hearing is likely to be both long and useless: the Peanut Butter rule revisted.[174] Also, the record generated in such a proceeding will often lack the depth and focus of an adjudicative record. If judicial review is to take account of this tendency, it should allow the decision-makers greater latitude to draw inferences from a relatively thin base of facts, or to substitute policy judgments for factual proof. In short, the agency should have broader discretion.

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[174] *See generally* Hamilton, *Rulemaking on a Record by the Food and Drug Administration,* 50 Tex. L. Rev. 1131 (1972), for a discussion of the F.D.A.'s formal proceeding to establish standards of identity for peanut butter.

The recent "hybrid" statutes like Magnuson-Moss, in common with the judicial hybrid rulemaking cases decided before *Vermont Yankee,*[175] seem to be premised on a shifting consensus regarding the appropriate scope of agency discretion in rulemaking. Since the mid-1960's, there has been a continuing stream of pointed criticisms directed at various regulatory programs, emanating from sources as ideologically diverse as the American Enterprise Institute and the Nader-inspired public interest groups. A common theme of many of these critiques is the belief that agency policies developed under broad grants of discretion have often been either ineffective, or actively harmful. These cumulative suspicions about the overall quality of regulatory decisions may have generated a widespread belief that exercises of regulatory power must satisfy a higher burden of justification than they have traditionally been required to meet. This higher burden is reflected in several contemporary assumptions about regulatory decisions: the agency must have better factual and analytical support for its rules and policies; it must expose its data, methodology and policy assumptions to meaningful outside criticisms; and it must respond to the points and objections raised by outside parties, at least to the extent of having reasonable grounds for rejecting them.[176]

Realizing these objectives requires greater procedural and substantive structuring than agencies have traditionally used in discretionary notice-and-comment rulemaking. Substantively, the agency must be willing and able to identify with some precisions the legal, technical, factual and policy bases of its proposal. Procedurally, this structuring must take place while there is still a meaningful opportunity for public participation. The difficulty in developing hybrid models of "intermediate" structuring of either kind is adequate, or for determining the stage of the process at which the agency should be prepared to set boundaries on its tentative decision and let the opponents challenge it. There are also strong tactical incentives for the major actors to push toward one extreme or the other. From the agency's perspective, the longer it can postpone taking a stand, the more it can keep its options open and minimize the critics' opportunities to undermine its proposal. For the opponents, on the other hand, the earlier they can pin the agency down to a narrow theoretical and factual base and put the staff on the defensive, the better chance they will have to defeat the rule. Both the FTC and the trade regulation bar have been sensitive to these tactical considerations, and have pushed as far toward the extreme models as the statute would allow.[177]

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[175] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

[176] *See generally* DeLong, *Informal Rulemaking and the Integration of Law and Policy,* 65 Va. L. Rev. 257 (1979), and authorities cited therein, esp. at note 22.

Because there are few benchmarks in this middle range, the effort to evaluate whether the FTC's approach or some alternative procedures would be more conducive to an "accurate" decision involves considerable speculation. However, some general observations about the FTC's implementation of the Magnuson-Moss Act seem warranted. As noted above, the substantive structuring often takes place quite late in the proceedings; in many instances, it did not happen until the very end of the administrative process. A related point, and a possible contributing factor, was the Commissioners' general lack of involvement in the process and their failure to provide "feedback" to the participants during most of the public proceedings. Finally, the sequence of procedural events, in which the evidentiary hearing is held before there is a realistic possibility of narrowing the issues or the basis for decision, has negative implications not only for the quality of the final decision but also, as discussed below, for the costlines and efficiency of the process. All of these conditions seem to create some obstacles to building the kind of record support that is contemplated, if not required, by the statute.

C. Fairness and Acceptability

Apart from any contribution that they make to the accuracy or quality of the decision, trial-type procedures might be favored on the ground that they are fairer to affected persons and groups than less formal modes of decision-making. Due process requires that persons who have important interests at stake should be given notice and an opportunity to participate before government agencies make decisions that will adversely affect them. Trial-type procedures provide a wide range of participatory rights; thus, they might be required as a means of assuring that interested persons will be given a full hearing before final decision, even if a formal hearing is not necessary to satisfy due process requirements or to assure accurate decision-making. A related justification for participatory rights in general, and trial-type hearings in particular, is the notion that when affected parties feel they have been given a fair hearing, they will be inclined to view the final decision as a legitimate exercise of governmental power even though they may dislike the particular outcome. In other words, the perception that the procedures are fair and that the participants have been given a full hearing will make the process acceptable.[178]

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[177] *See* ACUS Phase I Report, Chapter V (participants' attempts to use discovery devices); text accompanying notes 131–35, *supra* (discussion of outside participants' versus staff's view of Act's requirements).

[178] *See, e.g.*, Professor James Freedman's discussion of "Administrative Procedure and the Nature of Legitimacy," in J. Freedman, Crisis and Legitimacy 125–33 (1978).

The language and legislative history of the Magnuson-Moss Act suggests that the Congress was concerned with providing affected interests more extensive opportunities to he heard than they would receive under notice-and-comment rulemaking.[179] During the course of this study, survey questionnaires were administered to witnesses in seven early rulemaking proceedings conducted under the statute.[180] Their responses provide some basis for evaluating the extent to which the participants found the process to be fair and acceptable.

When asked about particular aspects of the process, the witnesses expressed generally positive attitudes toward the hearing procedures. They strongly preferred oral to written participation, by a margin of more than four to one.[181] Substantial minorities expressed a desire for additional procedural rights, such as an opportunity to speak directly to the Commissioners or to question other witnesses.[182] Cross-examination also received widespread, though not universal, endorsement. While most of the witnesses knew before they testified that they would be subjected to questioning,[183] only a small minority reported that the prospect of cross-examination had affected their testimony.[184] On the other hand, nearly 80 percent felt that the questioning helped others to understand their position.[185] More than half of the witnesses believed that the examiners weretrying to embarrass or discredit them,[186]. but only a few seemed to be seriously disturbed by this. [187]

There were some indications that the complex procedures of the Magnuson-Moss Act were difficult for laymen to comprehend. Most of the respondents did not participate actively in the other stages of the process; the procedural rights which were available before and after the evidentiary hearing were usually exercised by the group representatives, who were mostly lawyers. As might be expected, the witnesses did not seem to have a very clear understanding of the hearing procedures,[188] and more than a third of them felt that it was necessary to have a lawyer in order to participate effectively in trade regulation rulemaking.[189]

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[179] *See* ACUS Phase I Report, Chapter II, at 29–39.

[180] The survey questionnaire and selected data tables derived from the responses are set forth in the Special Appendix.

[181] *See* Special Appendix, Series III, Table 60E and 60F.

[182] *Id.* at Series III, Table 57 A (57.7 percent would have questioned other witnesses if permitted); Table 57B (54.9 percent would have questioned FTC staff if permitted); Table 57C (59.6 percent would have spoken directly to Commissioners if permitted).

[183] *Id.* at Series III, Table 46.

[184] *Id.* at Series III, Table 47 (12.5 percent report that prospect of cross-examination affected their testimony).

[185] *Id.* at Series III, Table 53.

[186] *Id.* at Series III, Table 54.

[187] This conclusion is derived both from hearing observations, and from the comments which many witnesses wrote on their questionnaires.

[188] This conclusion is based upon hearing observations, the witnesses' ability to identify procedural terminology on the questionnaire (*see* Special Appendix, Series III, Tables 61A–61L), the witnesses' general level of prior experiences (*see id.* Tables 4–8), and the fact that many

While favorable attitudes toward the procedures predominated, a significant proportion of the witnesses believed that the fairness of the process left something to be desired. More than a third agreed with the proposition that the outcome had already been decided before the hearing began.[190] In addition, approximately half felt that the FTC staff had taken an adversary position during their testimony,[191] and almost twenty percent felt that the Presiding Officer had shown favoritism toward some witnesses or points of view.[192]

More significant than the aggregate statistics on witness attitudes were the relationships between the expressed attitudes of the respondents and their characteristics or experiences. Most of the attitude items relating to the fairness and impartiality of the process were strongly correlated with each other, and with the witnesses' attitudes toward the proposed rule and the agency. Witnesses who disliked the proposed rule or distrusted the agency were more inclined to feel that the procedures were unfair. Since the hearing procedures did not vary substantially among the TRR's studies, this finding casts considerable doubt on conventional assumption that constituent-group perceptions of procedural fairness will generate acceptance of the administrative decision. Rather, the participants' substantive attitudes—especially their like or dislike for the proposed rule—seem to color their beliefs about the fairness of the process.

Further support for this conclusion can be found inthe data describing the ways that witness attitudes varied across the hearings studied. The Funeral Practices and Hearing Aids proceedings, identified as the most contentious hearings by observers connected with this study, had higher proportions of witnesses who were strongly and consistently critical of the procedures. This varying "polarization" of witness attitudes could not be explained by the mixture of pro-rule and anti-rule witnesses who appeared in the different hearings or by the witnesses' knowledge or prior experience. However, it was correlated very strongly with the "mobilizing" activities of trade associations, consumer groups, and the FTC staff. These intermediaries were busy

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witnesses wrote comments on their questionnaires complaining that no one had adequately explained the process to them (*see* ACUS Phase I Report, Chapter VI, at 74–75).

[189] Special Appendix, Series III, Table 60I, 60J.

[190] *Id.*, Series III, Tables 60C, 60D.

[191] *Id.* Series III, Table 49. Twenty-six percent viewed the staff as pro-rule; 3.8 percent thought the staff had taken an accusatorial or prosecutorial position; and 6 percent felt that the staff had tried to protect them during their testimony.

[192] *Id.* Series III, Tables G, H. This response was heavily concentrated in two proceedings. In 5 of the 7 core TRR proceedings, less than 10 percent of the respondents believed that the Presiding Officer showed favoritism. However 23.4 percent of the respondents in Hearing Aids, and 35.6 percent of the Federal Practices respondents, agreed that the Presiding Officer had favored some witnesses or points of view.

recruiting and advising potential witnesses both before and during the hearings, and most witnesses had some degree of contact with them. Since the procedures used in trade regulation rulemaking were complex and unfamiliar to laymen, the witnesses evidently depended on the intermediaries to explain and interpret the process for them. When the mobilizing groups were hostile to the FTC or suspicious of the process, the witnesses tended to pick up these views.

Tables 1 to 7 summarize the basic evidence for this conclusion. For convenience, the attitude variable have been recoded in a positive-negative direction. A positive attitude generally implies approval of the hearings or the FTC, and a negative attitude implies disapproval. The first two tables show the aggregate witness responses. To illuminate the relationships among these variables, it is necessary to examine the ways in which witnesses' attitudes vary across proceedings, and then to explore the extent to which these attitudes are influenced by contacts with trade associations, consumer groups, and the FTC staff.

The overall pattern is clear: witness sentiments tend to be positive in Food and Protein and negative in Funerals.[193] The figures in Table 3 (cols. 1–5) represent mean deviation scores. Mean deviation scores refer to the means for each proceeding minus the grand mean for the variable (Proceeding Mean - Variable Mean). A quick, glance down the first and fourth columns shows mostly positive scores in Food and Protein and negative scores in Funerals. Among the procedural attitudes (Ex Parte to Procedural Remarks), eleven of the thirteen proceeding differences are statistically significant at the .05 level. Of the eleven significant attitude differences, the Food-Protein mean always differs from the Funeral mean, and the signs are the same—a positive attitude in Food-Protein and a negative attitude in Funerals.

Can these variations in witness sentiments be explained by attitudes toward the proposed rule? Explanations based on the witnesses' support for or opposition toward the rule can take two forms. Witness sentiments in Food-Protein and Funerals could reflect:

1. a different *distribution* of pro-rule and anti-rule witnesses in the two proceedings (a greater proportion of pro-rule witnesses in Food-Protein than in Funeral produces a higher proportion of witnesses with positive attitudes toward the hearings); or
2. different levels of pro-rule and anti-rule *polarization* in the two proceedings (anti-rule witnesses, regardless of their proportional

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[193] The Food Advertising and Protein Supplements proceedings were combined for purposes of this analysis because of their similar subject-matter, and because the merging of responses simplified statistical analyses. The Holder In Due Course proceeding was dropped from the analysis because it was an atypical hearing with a high proportion of lawyer-witnesses, and the number of respondents was too small to support valid statistical inferences.

TABLE 1

INVENTORY OF DEPENDENT VARIABLES IN THE WITNESS QUESTIONNAIRE

Positive, Negative Attitudes Toward the Proposed Rule and Hearing Procedures	Item or Index	Questions and Coded Values	Negative or Neutral Attitude	Positive Attitude	Mean	S.D.
Consumer Problems	Item	Are existing trade practices, —a major problem for consumers (3) —a minor problem for consumers (2) —not a problem for consumers (1)	Minor (26%) No (16%)	Major (58%)	2.42	0.75
Proposed Rule	Item	Will the proposed rule, —improve the situation (4) —do more harm than good (1)	Harm (42%)	Improve (58%)	2.75	1.48
Ex Patte Contacts	Index	The Presiding Officer should feel free to consult with interested parties after the hearings.	Disagree (38%)	Agree (63%)	0.03	1.87
		It would be unfair for the Presiding Officer to have private conversations about the rule after the hearings.	Agree (44%)	Disagree (56%)		
Fact-Based Outcome	Index	If the testimony at the hearings is strong enough, the FTC will probably make substantial changes in the rule.	Disagree (27%)	Agree (73%)	0.04	1.85
		These hearings will not make any difference; the FTC has already decided the outcome.	Agree (35%)	Disagree (65%)		
Written Comments	Index	It is not necessary to have all the testimony presented in person; written comments can be just as effective.	Disagree (79%)	Agree (22%)	−0.02	1.71

TABLE 1

INVENTORY OF DEPENDENT VARIABLES IN THE WITNESS QUESTIONNAIRE—Continued

Positive, Negative Attitudes Toward the Proposed Rule and Hearing Procedures	Item or Index	Questions and Coded Values	Negative or Neutral Attitude	Positive Attitude	Mean	S.D.
		Testifying orally and in person is more effective than submitting written comments because written comments can easily be ignored or misinterpreted by the FTC.	Agree (83%)	Disagree (17%)		
Presiding Officer	Index	The Presiding Officer conducted the hearing in a fair, impartial manner.	Disagree (12%)	Agree (87%)	0.03	1.88
		The Presiding Officer favored some witnesses or points of view more than others.	Agree (19%)	Disagree (83%)		
Citizen Impact	Index	The average citizen can often be just as effective as a laywer or lobbyist.	Disagree (41%)	Agree (59%)	−0.02	1.82
		FTC procedures seem to be weighted against the average citizen; you really need a lawyer to participate effectively.	Agree (34%)	Disagree (66%)		
FTC Staff	Item	Which statement best describes the behavior of any FTC persons during your testimony (other than the Presiding Officer). —open-minded investigators (4) —difficult to judge (3) —opposed anyone who disagreed with their position (2)	Partisan (32%) Cannot judge (8%)	Open (61%)	3.29	0.64

TABLE 1

INVENTORY OF DEPENDENT VARIABLES IN THE WITNESS QUESTIONNAIRE—Continued

Positive, Negative Attitudes Toward the Proposed Rule and Hearing Procedures	Item or Index	Questions and Coded Values	Negative or Neutral Attitude	Positive Attitude	Mean	S.D.
Agency Purpose	Item	Do you feel the FTC, —serves an important purpose (4) —sometimes useful, but not always (3) —no important purpose or should be abolished (2)	Not Always (40%) None (3%)	Important (56%)	2.51	0.64
Hearing Fairness	Item	Were these hearings, —impartial and objective (4) —biased in favor of industry, consumers or the FTC. (2)	Biased (46%)	Impartial (54%)	3.08	1.00
Cross-Examination	Item	Did any of those who asked questions try to embarrass or discredit you? —No (4) —Yes (2)	Yes (59%)	No (41%)	2.82	0.98
Time Scheduling	Item	Was the amount of time you were given to testify: —about right (3) —too much or too little (2)	Too much, too little (13%)	About right (87%)	2.87	0.33
Prehearing Instructions	Item	Before testifying, did you feel, —well informed about hearing procedures; (3) —adequately informed but not sure of some points; (2) —not adequately informed about hearing procedures (1)	Adequate (37%) Inadequate (16%)	Informed (47%)	2.31	0.73

TABLE 1

INVENTORY OF DEPENDENT VARIABLES IN THE WITNESS QUESTIONNAIRE—Continued

Positive, Negative Attitudes Toward the Proposed Rule and Hearing Procedures	Item or Index	Questions and Coded Values	Negative or Neutral Attitude	Positive Attitude	Mean	S.D.
Hearing Formality	Item	FTC hearing procedures are, —about right, neither too formal nor too casual; (3) —too formal (should be more like a round-table discussion), too informal (should be more like a court trial) (2)	Too formal, too informal (24%)	About right (76%)	2.76	0.43
Procedural Remarks	Item	Number of positive and negative marginal comments about the hearing procedures (coded +1, −1 each).			−0.35	0.78

TABLE 2

INVENTORY OF INDEPENDENT VARIABLES IN THE WITNESS QUESTIONNAIRE

Witness Activities, Backgrounds and Sponsorship	Item or Index	Questions	Coded Values				Range	Mean	S.D.
			No	Not Sure	Familiar	Very Familiar			
Rulemaking Specialist	Index	How many terms do you recognize?					−1.16, +4.79	−0.24	1.89
		—6(b) orders	71%	9%	11%	9%			
		—(d) (5) and (J) (6) issues	72%	8%	10%	10%			
Administrative Law Specialist	Index	How many terms do you recognize?					−1.36, +8.26	−0.13	2.33
		—ALJ	85%	4%	4%	7%			
		—Section 5 violation	85%	4%	8%	7%			
		—APA	84%	4%	7%	9%			
Individual Consumer	Index	Witness constituent interests	(0) No		(1) Yes		0,1	0.11	0.32
Business Target	Index	Witness constituent interests	(0) No		(1) Yes		0,1	0.30	0.46
Government Official	Index	Witness constituent interests	(0) No		(1) Yes		0,1	0.16	0.36
Expert	Index	Witness constituent interests	(0) No		(1) Yes		0,1	0.25	0.43
Length of Cross-Examination	Item	Number of hearing transcript pages devoted to witness' cross-examination (in natural log units)					0,	3.36 5.21	0.74
Witness Other Forums	Index	Number of times as a witness In: —court proceedings —legislative body —other administrative agencies	(0) None (27%) (1) 1–5 times in at least one forum (46%) (2) more than 5 times in at least one forum (27%)				0,2	1.00	0.73
Prior FTC Witness	Item	Number of times as a witness in FTC hearings	(0) None (63%) (1) 1 or 2 (34%) (3) 3 to 5 (2%) (6) More than 5 (1%)				0,6	0.45	0.76

TABLE 2

INVENTORY OF INDEPENDENT VARIABLES IN THE WITNESS QUESTIONNAIRE—Continued

Witness Activities, Backgrounds and Sponsorship	Item or Index	Questions	Coded Values				Range	Mean	S.D.
			No	Not Sure	Familiar	Very Familiar			
Lawyer	Item	Are your a lawyer?	(0) No		(1) Yes		0,1	0.11	0.31
Testimony Research	Index	Count of different kinds of written information (*e.g.*, published articles, government reports) used in preparing testimony.					0,10	3.82	2.26
Activity Prior to Testimony	Index	Counts different stages or types of witness participation in the proceedings (*e.g.*, submitted proposals for disputed issues or Freedom of Information Act request)					0,6	1.17	1.12
Pro-Rule Association Ties	Index	How did you first find out that the FTC was considering this rule?	Pro-rule ses'n (Weight 1)				0,7	0.92	1.89
		Did you discuss the rule or your testimony with someone else?	Pro-rule ses'n (Weight 1)						
		Did a group or association request your testimony?	Pro-rule ses'n (Weight 2)						
		Will you be compensated or reimbursed for any of your expenses and by whom?	Pro-rule ses'n (Weight 3)						
Con-Rule Association	Index	(*see* Pro-Rule Questions above)	(*see* Pro-rule weights above)				0,7	1.50	2.48
FTC Ties	Index	(*see* Pro-Rule Questions above)	(*see* Pro-rule weights above)				0,7	1.40	2.17

TABLE 3*

UNADJUSTED MEAN DIFFERENCE ACROSS PROCEEDINGS FOR DEPENDENT VARIABLES

	Unadjusted Mean Deviation Scores					Univariate Significance Tests (Mean Differences)	
Dependent Variables	Food Protein	Eye-glasses	Hearing Aids	Funerals	Total	F	Prob.
Consumer Problems	−0.03	0.08	0.11	−0.11	0.00	3.04	.028
Proposed Rule	0.22	−0.05	0.19	−0.24	0.00	3.51	.015
Ex Parte Contacts	0.24	0.18	0.28	−0.48	0.00	6.75	.000
Fact-Based Outcome	0.72	−0.29	0.14	−0.48	0.00	12.13	.000
Written Comments	0.27	0.22	0.05	−0.22	0.00	2.66	.048
Presiding Officer	0.79	0.63	−0.33	−0.68	0.00	24.66	.000
Citizen Impact	0.02	0.19	0.13	−0.15	0.00	1.08	.359
FTC Staff	0.14	0.14	0.12	−0.30	0.00	3.37	.000
Agency Purpose	0.28	−0.22	−0.01	−0.06	0.00	5.05	.002
Hearing Fairness	0.19	−0.05	0.00	−0.14	0.00	3.18	.024
Cross-Examination	0.22	0.15	−0.12	−0.13	0.00	4.97	.002
Time Scheduling	−0.03	0.05	−0.02	0.00	0.00	1.17	.322
Prehearing Instruction	0.17	0.06	0.09	−0.20	0.00	8.48	.000
Hearing Formality	0.06	0.06	0.03	−0.09	0.00	5.05	.002
Procedural Remarks	0.03	0.22	0.15	−0.26	0.00	12.28	.000
Observations	113	125	145	201	584	D.F.	(3,580)

* Table 3 describes the attitudes of the average witness in each proceeding.

distribution, report a greater number of negative reactions to the procedures in Funerals than in Food-Protein.)

Comparing pro-rule and anti-rule witnesses, the distribution hypothesis implies a *constant* effect of rule attitudes on procedural attitudes across proceedings. That is, the proportion of pro-rule and anti-rule witnesses may vary from proceeding to proceeding, and the percent of positive procedural attitudes and procedural attitudes will remain the same, regardless of proceeding. The polarization hypothesis, on the other hand, implies *varying* effects of rule attitudes on procedural attitudes across proceedings. In some proceedings, individual witnesses may like some aspects of the hearings and dislike others, but there is no consistent, uniform split between pro-rule and anti-witnesses. In other proceedings, however, pro-rule and anti-rule witnesses will tend to divide themselves into two relatively homogeneous groups, each having a distinct view of the proceedings—positive attitudes for pro-rule witnesses and negative attitudes for anti-rule witnesses.

How can the distribution and polarization hypotheses be tested? The principal statistical difference between the hypotheses concerns the distinction between main effects and interaction. Main effects have the same impact on procedural attitudes in each proceeding, and interactions have

TABLE 4

Two-Way Analysis of Variance (Proceeding, Rule Attitude) for Unadjusted Dependent Variables

	Main Effects*						Pearson Correlations: Proposed Rule Attitude with Dependent Vars.				
	Pro-Con Rule		Proceedings		Interaction						
Dependent Variables	F (1,577)	Prob	F (3,577)	Prob	F (3,577)	Prob	Food Proten	Eye-glass	Hear Aids	Fun-erals	Total
Consumer Problems	374.44	.000	2.72	.044	0.84	.474	.594	.625	.577	.676	.629
Proposed Rule	—	—	—	—	—	—	1.000	1.000	1.000	1.000	1.000
Ex Parte Contacts	2.39	.122	6.56	.001	7.58	.001	–.092	–.166	.007	.276	.088
Fact-Based Outcome	269.33	.000	10.16	.001	10.64	.001	.257	.563	.584	.657	.568
Written Comments	24.96	.000	1.97	.118	1.20	.308	.158	.080	.280	.235	.209
Presiding Officer	108.76	.000	27.67	.800	20.64	.000	.098	.020	.608	.491	.388
Citizen Impact	143.40	.000	0.83	.478	7.28	.001	.231	.268	.420	.592	.436
FTC Staff	535.02	.000	6.05	.001	4.68	.003	.627	.540	.779	.758	.699
Agency Purpose	279.62	.000	5.51	.001	6.64	.001	.362	.432	.611	.688	.558
Hearing Fairness	387.33	.000	1.34	.262	5.65	.001	.437	.499	.698	.741	.627
Cross-Examination	2.01	.156	4.19	.006	1.91	.126	.013	.229	.016	.009	.067
Time Scheduling	8.01	.005	1.48	.219	1.64	.178	.173	.274	.137	.015	.127
Prehearing Instructions	42.12	.001	6.99	.001	16.11	.000	.116	.151	.054	.513	.271
Hearing Formality	62.96	.001	3.80	.010	10.01	.000	.112	.068	.290	.513	.314
Procedural Remarks	15.00	.000	10.82	.000	6.66	.001	.030	.117	.028	.298	.174
					Observations		.113	.125	.145	.201	.584
					.05 Prob. (r-0)		*.188	*.178	*.165	*.139	*.082
					Mean (r^2)		.094	.119	.206	.273	.180

* Note: ANOVA calculated according to the "classical" experimental design model; *ie.*, the interaction term is controlled for the main effects, but neither main effect is controlled for the interaction term.

TABLE 5

Witness Constituent Interests and Sponsorship

	Food and Protein								Eyeglasses								Hearing Aids								Funerals							
Interest	No Ties	Weak FTC	Strong FTC	Weak Pro	Strong Pro	Weak Con	Strong Con	Hearing %	No Ties	Weak FTC	Strong FTC	Weak Pro	Strong Pro	Weak Con	Strong Con	Hearing %	No Ties	Weak FTC	Strong FTC	Weak Pro	Strong Pro	Weak Con	Strong Con	Hearing %	No Ties	Weak FTC	Strong FTC	Weak Pro	Strong Pro	Weak Con	Strong Con	Hearing %
Individual Consumer		3	4					5.9	2	2	3	1	1			7.2	6	2		4	2		6	12.6	11	3	4	5	4	2	3	15.8
Consumer Group			2		1			2.5		1	3	1	4			7.2			2	5	5	1		8.2	1		4	3	6	1		7.4
Retail Target			2			1		2.5	8	4		2	3			13.6	3					3	6	7.5	4	2	1	0	2	12	23	21.7
Fee-Service Target								0.0	4	2				8	19	26.4	5	4	3	12	10	3	10	29.6								0.0
Mfr.—Wholesale	2				1	2		4.2								0.0	1	2				1	7	6.9	1				1		2	2.0
Trade Association			1			1	5	5.9					2	1	6	7.2			1	1	1		4	4.4		1		1		2	7	5.4
Govt.—Cons. Protection		1						0.8	1	4	3					6.4	3	1					1	3.1	2	1	2					2.5
Govt.—Occup. Licensure	2							1.7	3	2						4.0	2			1	1		2	3.8	10	2	3			4	4	11.3
Govt.—Exec./ Legislative	1		4	1				5.1	2	6	1					7.2	4	2	2	1			1	6.3	5	6	2			1	1	7.4
Experts	9	9	42	5	4	5	6	67.8	1	2	6	2	1	1	8	16.8	2	2	5	3	4		6	13.8	1	1	8	1	7	0	8	12.8
Others	1		1			2		3.4	1	2		1	1			4.0	2			1	2		1	3.8	6	4	2	2	2	5	7	13.8
Total	15	13	56	6	6	11	11	100.0	22	25	16	7	12	10	33	100.0	28	13	13	28	25	8	44	100.0	41	20	26	12	22	27	55	100.0
Lawyer					1	2	3	5.1	4	6	5	2	2		3	17.9		3	2	1	1		6	8.2	8	5	4	3	1	1	3	12.5

different effects on procedural attitudes in each proceeding. The polarization hypothesis predicts a statistically *significant* interaction between proceedings and substantive positions on the rule. It assumes that strength and breadth of the pro-rule and anti-rule division varies from proceeding to proceeding. The distribution hypothesis, on the other hand, predicts *no* statistically significant interaction between proceedings and substantive positions on the rule. It assumes that the pro-rule and anti-rule division has the same force in each proceeding. The distribution hypothesis also predicts no main effects for the proceeding variable. Once procedural attitudes have been controlled for substantive positions on the rule, the differences in positive and negative attitudes across proceedings will largely disappear.

Table 4 tests these two hypotheses.

The results generally support the polarization hypothesis: most of the procedural attitudes in Table 4 show an interaction between rule position and proceedings. Of the thirteen procedural attitudes (Ex Parte to Procedural Remarks), ten of the attitudes have a statistically significant interaction at the .01 level. Furthermore, these ten interactions all show substantially higher correlations with pro-con positions in the Funeral proceeding than in the Food-Protein proceedings. For the ten interactions, the average proportion of variation explained by substantive positions on the rule (r^2) is 33 percent of Funerals and 9 percent for Food-Protein.

Hearing observations and a preliminary analysis of the questionnaire responses suggested that attitude polarization may have been influenced by the mobilizing activities of the FTC staff and the intermediary organizations. The questionnaire asked witnesses about their contacs with sponsoring organizations, and this information was supplemented by observation reports and data supplied by the FTC and the group representatives. Table 5 provides the detailed figures on mobilization patterns.

The mobilization index pools information data on how the witnesses first learned about the rule, who asked the witnesses to testify at the hearings, and who compensated the witnesses. In constructing the index, witnesses compensation and requests to testify were treated as the most important indicators of close ties to a sponsoring organization. (The rules for the index construction are described on page 2 of Table 2, *supra.*) The index guages the strength of witnesses' ties to the major sponsoring organizations (the FTC, pro-rule associations and anti-rule associations). Across all of the proceedings, most witnesses have some ties to sponsoring organizations. Approximately four-fifth (82.5%) of all respondents had at least one contact with one or more organizations. Thirty-two-and-nine-tenths percent of all witnesses had at least one contact with anti-rule associations 30.1% of all witnesses had at least one contact with the FTC, and 19.5% of all witnesses had at least one contact with pro-rule associations. Among the sponsored witnesses, 63.9% of the witnesses had strong mobilization ties and 36.1% had weak mobilization ties. Anti-rule associations had the strongest witness ties, and pro-rule associations had the weakest witness ties. The ratio of strong ties to weak ties was 2.7 for anti-rule witnesses, 1.6 for FTC witnesses and 1.2 for pro-rule witnesses.

Within the proceedings, relationships among the mobilizing organizations varied in strength and composition. Some proceedings had a single dominant source of mobilization. For example, the FTC sponsored two-thirds (67.0%) of the mobilized witnesses in the Food-Protein proceedings, and anti-rule associations sponsored half (50.7%) of the mobilized witnesses in the Funerals proceeding. Both the FTC and the anti-rule associations had relatively strong witness ties in these proceedings. The ratio of strong ties to weak ties was 4.7 for FTC witnesses in the Food-Protein proceedings and 2.0 for anti-rule witnesses in the Funeral proceeding. Other proceedings had two dominant sources of mobilization. The FTC and anti-rule associations sponsored approximately two-fifths of the mobilized witnesses (39.8% and 41.7% respectively) in the Eyeglasses proceeding, and pro-rule and anti-rule associations sponsored the same proportion of the mobilized witnesses (40.5% and 39.7% respectively) in the Hearing Aids proceeding. The anti-rule associations had much stronger witness ties in these proceedings than the FTC and the pro-rule associations. The ratio of strong ties to weak ties for anti-rule associations was 3.3 in the Eyeglasses proceeding and 5.5 in the Hearing Aids proceeding. In contrast, the ratio of strong to weak ties was 0.6 for FTC witnesses in the Eyeglasses proceeding and 0.9 for pro-rule witnesses in the Hearing Aids proceeding.

To what extent do these sponsorship ties explain variations in witness attitudes both within and across proceedings? Table 6 summarizes the overall relationships between sponsorship ties (as well as other witness characteristics) and the witnesses' attitudes toward the rule and the hearings.

A statistical procedure known as canonical analysis has been used to describe the results. A canonical analysis examines the relationship between multiple independent and dependent variables. It treats both independent variables (sponsorship ties) and dependent variables (witness attitudes) simultaneously. A canonical analysis reduces the variance within each set of variables and, at the same time, it maximizes the correlation between the sets of variables. The canonical correlation answers the question: do sponsoring ties, taken as a whole, explain or predict witnesses' attitudes taken as a whole? Since substantive and procedural attitudes are more closely associated in Funerals than in Food-Protein, witness mobilization should be a more important predictor of attitudes in Funerals than in Food-Protein.

Table 6 reports the results for the first or more important canonical model for each proceeding. The coefficients in the columns rank the relative importance of the variables in the model. The summary statistics at the bottom of the table describe the model's overall explanatory power: (a) percent of trace shows the amount of association among the attitudes taken by themselves (the proportion of variation extracted from the dependent variables

TABLE 6

CANONICAL CORRELATIONS BETWEEN INDEPENDENT AND DEPENDENT VARIABLES: STRUCTURAL COEFFICIENTS (FIRST SOLUTION ONLY)

Dependent Variables	Food/ Protein	Eye-glasses	Hearing Aids	Funerals	Total	Independent Variables	Food/ Protein	Eye-glasses	Hearing Aids	Funerals	Total
Consumer Problem	.61	.60	.60	.64	.64	Rule Spec.	−.22	.22	−.12	−.02	−.06
Proposed Rule	.92	.88	.95	.88	.95	Adm. Law Spec.	−.34	.38	.04	.19	.10
Ex Parte Contacts	−.01	−.24	−.16	.41	.06	Consumer	.10	.38	−.16	.24	.14
Fact-Based Outcome	.34	.63	.55	.82	.70	Target	−.27	−.49	−.33	−.49	−.42
Written Comments	.09	.16	.47	.26	.30	Government	.01	.35	.19	.00	.08
Presiding Officer	.18	−.05	.62	.59	.49	Expert	.34	−.04	.12	.21	.25
Citizen Impact	.42	.57	.33	.70	.52	Cross Time	.38	−.45	−.21	−.35	−.15
FTC Staff	.67	.63	.81	.87	.78	Other Forums	−.26	.05	−.23	.01	−.10
Agency Purpose	.49	.46	.60	.68	.61	FTC Witness	−.13	.11	−.10	.21	.07
Hearing Fairness	.55	.71	.65	.80	.75	Lawyer	.36	−.29	−.02	−.13	−.03
Cross-Examination	−.14	.18	−.03	.15	.12	Research	−.04	−.07	−.01	−.27	−.10
Time Scheduling	.05	.09	.11	−.06	.04	Pre-test. Act.	.04	−.14	−.16	−.18	−.14
Prehearing Instructions	.31	.24	−.05	.54	.32	Pro Ass'n Ties	.22	.40	.54	.47	.48
Hearing Formality	.26	.09	.25	.68	.38	Con Ass'n Ties	−.69	−.89	−.93	−.87	−.88
Procedural Remarks	.02	.05	.11	.55	.22	FTC Ties	.82	.61	.34	.56	.60
Observations	106	112	133	171	522						
Canon. Corr.	.821	.827	.822	.800	.754						
% Trace	18.2	21.0	25.4	39.1	28.3						
Redundancy	12.3	14.4	17.2	25.0	16.1						
Prob. Wilkes	.000	.000	.000	.000	.000						

(Summary Statistics for First Solution)

treated alone); (b) percent of redundancy shows the amount of association among the attitudes explained by sponsorship ties and the other independent variables (the proportion of variation in the dependent variables explained by the independent variables); and (c) the Wilkes probability shows the statistical significance of the model (the probability the model could have arisen by chance).

What do the canonical results show? First, the dependent variables, on the left side of Table 6, resemble the correlations on the right side of Table 4. Associations among all the dependent variables increase steadily from the Food-Protein proceeding to the Funerals proceeding. The percentage of trace increases from 18.2 percent in Food-Protein to 39.1 percent in Funerals, indicating stronger relationships (greater cohension) among the witnesses' attitudes in Funerals than in Food-Protein. Second, the mobilization indices (Pro-rule ties to FTC ties) constitute important independent variables for explaining witness attitudes. Using .40 as a rough measure of importance, the mobilization or sponsorship variables have coefficients of .48 or above for the total sample and coefficients of .40 or above in ten out of twelve of the proceeding coefficients. Third, the independent variables, as a whole (and the mobilization variables specifically) have more explanatory power in Funerals than Food-Protein. The redundancy coefficient, measuring the proportion of variation in witnesses' attitudes explained by the independent variables, is 12.3 percent in Food-Protein and 25.0 percent in Funerals. In both Food-Protein and Funerals, FTC sponsorship is positively related to witnesses' attitudes, and anti-rule sponsorship is negatively related to witnesses' attitudes. As might be expected, FTC sponsorship predicts positive attitudes toward the hearings, and anti-rule sponsorship predicts negative attitudes toward the hearings. Taken together, however, the two sources of mobilization, FTC contacts and anti-rule association contacts, have a greater impact on attitudes in Funerals than in Food-Protein.

Does witness sponsorship explain the phenomenon of increased attitude polarization? If the influences of witness sponsorship were eliminated, would witnesses' attitudes still be more polarized (reflect more pro-con divisions) in Funerals than in Food-Protein? By controlling the attitude variables statistically, it is possible to predict each attitude with a small number of independent variables and then to examine the unexplained variations (or residuals) to see if proceeding differences in attitudes remain. Table 7 presents the proceeding differences after each attitude has been adjusted for the mobilization variables (Pro-rule ties to FTC ties) and the length of cross-examination (Cross Time). Controlling for the length of cross examination helps to standardize the amount of time spent by each witness at the hearings.[194]

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[194] *See* Special Appendix, Item ____ for the equations used in these adjustments. The regression equations include proceeding interactions for each independent variable to capture

(Continued)

TABLE 7

Two-Way Anlysis of Variance (Proceeding, Rule Attitude) for Adjusted Dependent Variables

	Main Effects*						Pearson Correlations: Proposed Rule Attitude with Dependent Vars.				
	Pro-Con Rule		Proceedings		Interaction						
Dependent Variables	F (1,573)	Prob	F (3,573)	Prob	F (3,573)	Prob	Food Proten	Eye-glass	Hear Aids	Fun-erals	Total
Consumer Problems	70.59	.000	7.78	.001	1.68	.171	.369	.458	.373	.491	.456
Proposed Rule	—	—	—	—	—	—	1.000	1.000	1.000	1.000	1.000
Ex Parte Contacts	0.29	.589	0.36	.782	1.98	.115	–.091	–.126	.118	.087	.016
Fact-Based Outcome	55.40	.000	2.23	.083	6.47	.001	.058	.377	.421	.380	.322
Written Comments	2.02	.156	1.99	.114	0.91	.438	.120	.005	.067	.072	.076
Presiding Officer	8.39	.004	5.14	.002	4.14	.006	–.088	.000	.370	.278	.195
Citizen Impact	36.42	.000	4.18	.006	2.01	.111	.110	.070	.270	.357	.224
FTC Staff (TIES ONLY)	92.48	.000	13.84	.001	2.65	.048	—	—	—	—	—
FTC Staff (TIES, CROSS)	78.11	.000	0.92	.430	1.14	.333	.439	.399	.537	.540	.382
Agency Purpose	49.34	.000	1.78	.150	5.41	.001	.172	.303	.450	.540	.382
Hearing Fairness	50.60	.000	0.74	.526	3.69	.012	.240	.210	.524	.540	.403
Cross-Examination	0.75	.386	4.31	.005	1.15	.327	.061	.169	.030	–.072	.027
Time Scheduling (NO. ADJ)	8.01	.005	1.48	.219	1.64	.178	.173	.274	.137	.015	.127
Prehearing Instructions	6.69	.010	0.31	.817	4.10	.007	–.108	.030	–.070	.319	.106
Hearing Formality	14.27	.000	0.01	.998	2.00	.113	–.025	.029	.141	.295	.142
Procedural Remarks	1.04	.328	1.28	.280	0.40	.753	.011	.206	.116	.092	.102
					Observations		.111	.125	.145	.200	.581
					.05 Prob. (r-0)		*.188	*.178	*.165	*.139	*.082
					Mean (r^2)		.036	.058	.098	.122	.072

* Note: ANOVA calculated according to the "classical" experimental design model; *ie.*, the interaction term is controlled for the main effects, but neither main effect is controlled for the interaction term.

For the most part, controlling for witness sponsorship and the length of cross-examination tends to reduce the magnitude of pro-rule and anti-rule attitude differences. But some contrasts between Food-Protein and Funerals still remains. First, the number of statistically significant interactions has been cut in half. The unadjusted attitudes have ten significant interactions; the adjusted attitudes have five significant interactions at the 0.5 level. Among the five significant adjusted interactions, a clear trend from Food-Protein to Funerals appears only in three attitudes (agency purpose, hearing fairness and pre-hearing instructions). The remaining interaction attitudes, evaluations of written comments and the Presiding Officer, now have an ambiguous direction. Second, the correlations between substantive positions on the rule and procedural attitudes have been reduced in half for each proceeding. The average r^2 between rule positions and procedural attitudes is .18 for the unadjusted attitudes and .07 for the adjusted attitudes. Although some proceeding differences still remain—perhaps due to the substantive nature of the rules or the types of witness constituencies represented at the hearings—the phenomenon of pro-con polarization seems to be much less intense after controlling for the impact of witness mobilization and sponsorship.

These findings suggest that the relationship between administrative procedures and the perceived legitimacy of agency procedures is much more complex and less direct than is commonly supposed. Relationships between agency staff and intermediary organizations may be a key factor affecting the acceptability of the regulatory process. In the two most contentious and polarized proceedings, Hearing Aids and Funerals, hostility between the FTC staff and the spokesmen for the industry rule-opponents arose before the hearings even started,[195] and the anti-rule industry associations apparently were effective in convincing their constituents that the proceedings were stacked against them.[196] In other words, procedural opportunities to

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(Continued)

variations in mobilization effects across the proceedings. Most of the equations use the mobilization variables exclusively. Length of cross-examination only appears in two equations, attitudes toward the FTC staff and attitudes toward cross-examination.

[195] *See* ACUS Phase I Report, Chapter VI, at 15–18.

[196] In addition to the statistical results described above and the mobilizing literature obtained from the associations (*see* ACUS Phase I Report, Chapter VI, at 17), the questionnaires provided some direct evidence of this phenomenon. A significant number of survey respondents in the Funeral Practices proceeding used the final open-ended item to complain about particular procedural matters—in particular, that witnesses should be placed under oath, Presiding Officers should be independent, and that the participants should be allowed to select their own witnesses when there were too many to permit everyone to testify. The consistency of these remarks was notable, particularly in comparison to other proceedings were specific procedural critiques were rarely found in responses to the open-ended questions. Further investigation revealed that most of the witnesses who made the standardization procedural objections had sponsorship ties with an anti-rule trade association or one if its state affiliates.

participate in administrative proceedings may have only a very limited ability to make the final decision acceptable to the primary constituency groups.

D. Efficiency

In order to assess the efficiency of administrative proceedings, it is necessary not only to gather data describing the amount of time and resources required to make a particular kind of decision, but also make judgments as to whether those costs are justified. Analysis of delay in the proceedings, for example, can begin with statistics measuring the amount of time that passes between various stages of the process, but it also must include judgements as to whether that time was well or poorly spent, and what options are available for reducing it. It may also encompass some assessment of the external costs of lengthy proceedings—the consumers who may be victimized while a proposed rule is under consideration, or the effects of uncertainty and bad publicity on the target industry. As a general matter, there is no question that trade regulation rulemaking under the Magnuson-Moss Act can be a long and costly process. However, there is room for considerable disagreement as to whether, and how, the procedures can be made more efficient.

1. COST

Data concerning the direct costs associated with Magnuson-Moss rulemaking are sketchy and not entirely reliable, but the information that is available confirms the general impression that a major trade regulation rulemaking can easily cost more than a million dollars to complete. On the industry side, several of the lead trade associations opposing TRR's reported that they had spent from $300,000 to $500,000 by the time the evidentiary hearings closed—and the process still had a considerable distance to travel at that point.[197] These figures seem comparable to the investment of effort that was being made on the FTC side. Statistics on the total manhours invested by FTC staff were available for most proceedings, and frequently they totaled to more than ten thousand hours through the close of hearings.[198] In the Food Advertising rulemaking, more than 15,000 manhours were logged in the prehearing phases along.[199] In light of the fact that most of these hours represented the work of lawyers rather than paralegals or secretarial personnel, the total cost of the FTC was probbably at least as great as the aggregate expenses that industry was absorbing.[200] The indirect costs to consumers and industry during the five years or more that these proceedings take to complete probably were correspondingly large.

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[197] Nine major trade associatons were asked in early 1978 to supply information regarding their costs of participation in TRR proceedings, and three associations responded to the inquiry.

[198] *See* Appendix H, Chart 2 (Credit Practices, 14,800 hours by end of hearing); Chart 3 (Food Advertising, 21,000 hours by end of hearing); Chart 4 (Funderal Practices, 11,600 hours by end of hearing); Chart 5 (Health Spas, 14,800 hours by end of hearing); Chart 6 (Hearing Aids, 12,500 hours by end of hearing); Chart 8 (Mobile Homes, 18,300 hours by end of hearing); Chart 10 (OTC Antacids, 11,200 hours by end of hearings), and Chart 14 (Used Cars, 18,900 hours by end of hearing).

[199] *Id.* at Chart 3.

Available data do not provide very fine breakdowns of the costs associated with particular procedural devices, or support informed estimates of the costs that might be incurred under alternative decision-making procedures. However, one general tendency seems clear: while the expenses of conducting the evidentiary hearing are considerable in absolute terms, they appear to be relatively small compared to the effort invested in the prehearing and posthearing stages. For the FTC proceedings in which comparative data are available, prehearing manhours were generally at least twice as large as the total three times the amount of staff hours required for the public hearings.[201] Thus, unconfined cross-examination in the public hearings may be symptomatic of the general costliness of trade regulation rulemaking, but even the elimination of this stage of the process would not be a complete cure.

This is not to say, however, that the FTC's approach to the public hearings is the least costly alternative. Exploring issues through witness testimony with opportunity for cross-examination is, as a general matter, more costly than exchanges of documents for less formal types of hearings. Thus, the sequencing of the procedural stages may have significant effects on the costs of reaching a final decision. The Environmental Protection Agency

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[200] The average total of professional manhours reported in 15 TRR proceedings as of January 16, 1980 was just over 22,000 manhours which, in turn, is roughly ten and a half man-years (*see* Appendix F.) Only three of the 15 proceedings had been completed with issuance of a final rule, and the remaining proceedings were pending. Converting these manhour figures to dollar cost is difficult due to variance over time in staffing, pay grades, and salaries. Nevertheless, a general estimate of the cost to the FTC can be obtained by applying the 10.5 man-years to a typical rulemaking staff configuration. Based on FTC personnel records, the following are typical pay grades, and the October 1, 1977 pay schedule is used because it is approximately in the middle of the period of time covered by the rulemaking proceedings:

Position	Grade	Man-years		Pay on Oct. 1, 1977		Total
Presiding Officer	GS-15 (Step 5)	1.5	×	$40,995	=	$61,493
Managing Attorney	GS-14 (Step 5)	2.5	×	$34,850	=	$87,125
Staff Attorney	GS-13 (Step 5)	2.5	×	$29,490	=	$73,725
Staff Attorney	GS-12 (Step 2)	2	×	$22,612	=	$45,224
Research Analyst	GS-11 (Step 5)	2	×	$20,694	=	$41,388
Total						$308,955

The total cost of a proceeding to the FTC would, of course, be higher if the costs of clerical and record-keeping services, consultant contracts, travel expenses, court reporter and transcripts, printing of reports, and allocable agency overhead were included.

[201] *See* Appendix G.

has generally taken the opposite approach when establishing the order in which different participatory opportunities become available in hybrid rulemaking. At EPA, paper exchanges are usually followed by informal hearings; cross-examination is used only as a last-resort procedure for resolving issues that have not been fully developed at the earlier stages.[202] This approach seems more likely to minimize the total cost of the proceeding while preserving a limited right to cross-examine.

2. DELAY

When proceedings take four to five years or more to complete, it seems clear that there is some problem with delays in the process. However, it does not follow that the hybrid rulemaking procedures have caused the difficulties at the FTC. Lengthy rulemaking proceedings were not unknown at the Commission under the pre-amendment notice-and-comment practice; the Franchising rule, for example, had a gestation period of approximately seven years, and the Holder in Due Course base rule took nearly five years to complete.[203] On the other hand, the R-Value rule, issued under the Magnuson-Moss Act using a slightly modified version of the Rules of Practice procedures, moved reasonably quickly through the pipeline until it hit some snags in the final stages.[204] In general, it seems fair to conclude that the nature and scope of the rule, and the priority that the agency assigns to it, are key factors in determining the speed of resolution. A narrow, technical rule like R-Value can be processed fairly quickly, at least when the Commissioners make it known that they want fast action.

Even granting the importance of non procedural factors, however, it still seems useful to consider the amounts of time consumed during the various procedural stages. As Phase One of this study reported, most TRR proceedings began with an investigation that usually lasted a year or two.[205] In some instances, the staff's investigation continued into the public stages of the proceedings, with significant data-gathering and analysis taking place after the publication of Initial Notice.[206] After the Final Notice was issued, the public hearing usually concluded within a few months, and rebuttal ended within a month or two of the close of hearings.[207] The time required for the preparation of the Presiding Officer and Staff reports, however was considerably longer. It ranged from a minimum of half a year in the R-Value proceeding to a maximum of two and a half years in Protein Supplements, and the average was approximately twenty months.[208] The time required to prepare a statement of basis and purpose was also significant: in each of the first three proceedings decided by the Commission under the Magnuson-Moss Act, it took about half a year after final Commission deliberations to draft and publish the statement.[209]

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[202] *See, e.g.* Procedures for Rulemaking Under Section 6 of the Toxic Substances Control Act, 40 C.F.R. Part 750 (1979), and explanation accompanying proposed Part 750, 42 Fed. Reg. 20640 (April 21, 1977).

[203] *See* Data Appendix to the Phase I Report, Item 14. at 91.

[204] The notice of rulemaking in the R-Value TRR proceeding was published on November 18, 1977, and the Commission met to consider adopting a final TRR slightly more than a year later, on November 29, 1978. *See* Key Dates in the R-Value Proceeding, Appendix K to this report at page 51. A second meeting of the Commission was needed, however, to achieve agreement on the final rule, and it was not published with a statement of basis and purpose until August 27, 1979. *Id.*

[205] *See generally* ACUS Phase I Report, Chapter III at 8-30, and Data Appendix to the Phase I Report, Item 15, for basic data regarding the length of investigations preceding rulemaking.

[206] *See* ACUS Phase I Report, Chapter III at 38.

To some degree, it may be possible to reduce these prehearing and posthearing time intervals by assigning more staff attorneys to the proceedings, or by increasing the support services available to them, or by taking more draconian measures like the Commission's recent directive that staff reports must not exceed a maximum page limit.[210] However, these expedients are likely to have only limited effects. Assigning more people to work on the rules increases the problems of mangement and coordination, and may lead to fragmented or inconsistent approaches to the issues. Moreover, it is not necessarily true that shorter reports will be better, if the underlying issues are complex or indeterminate. There seems to be a substantial and perhaps irreducible cost in moving from the relatively discretionary decision-making of the pre-amendment TRR proceedings to the reasoned, explained, and record-supported regulatory decisions characteristic of hybrid rulemaking. Gathering large quantities of data, analyzing them and explaining the conclusions arrived at are labor-intensive processes, and most of the labor involved requires rather high levels of skill and salary.

If it is true that much of the cost of hybrid rulemaking is inherent in the process of reasoned decision-making, it also seems fair to conclude that the FTC's basic approach to rulemaking may well have magnified these inherent costs. As previously noted,[211] the Commission generally tried to keep the proceedings as close as possible to the discretionary, fact-gathering emphasis of its pre-amendment informal rulemaking. It proposed rules which contained numerous provisions, and which were based upon multiple, open-ended legal theories. To the extent that proof standards were discernible, they tended to make many things relevant but few determinative. The real effort to focus or narrow the issues came very late in the proceedings. Thus, in the early stages the participants spent considerable effort gathering information on all of the many potentially relevant matters, and trying to discover and discredit the correspondingly broad array of information that their opponents were generation. When the record closed, there was often a formidable collection of miscellaneous material to sift and analyze. Even if the records has been well organized and indexed, it would have required a lot of time and effort to distill some meaning from the mass of comments, exhibits, transcripts, reports, and other materials that filled the rulemaking records.

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[207] *See generally* the timelines for TRR's in Appendix K to this report; Data Appendix to the Phase I Report, Item 13 (table showing time intervals between key steps in the rulemaking proceedings.)

[208] Appendix J (table showing time intervals between key steps in the post-hearing stage.)

[209] *Id.*

[210] Commission Directive (October 10, 1978).

[211] *See* text accompanying and immediately preceding note 60, *supra.*

One conclusion that can be drawn from this experience is that hybrid rulemaking is most efficient (or perhaps can only be efficient) when the substantive decision is structured much like an adjudication: there must be fairly detailed legal or technical standards in place to establish the boundaries on the inquiry, and to inform the participants what kinds of information is relevant and probative. In the absence of such standards, judicialized public proceedings with extensive opportunities to participate can be an enormously expensive way to educate the agency.

IV. General Characteristics of Hybrid Rulemaking

The FTC's experience in implementing the Magnuson-Moss Act provides a limited, but useful, basis for making more general judgments about hybrid rulemaking. As the foregoing discussion suggests, there is reason to believe that this type of procedure should not be used unless basic policy decisions have already been made, and legal or technical standards are available to structure the subsequent rulemaking decisions. In the absence of such standards, legal devices like summary judgment do not provide workable tools to isolate a manageable number of issues for trial-type hearings. The best available doctrinal alternative, the distinction between general and specific fact issues, probably would not be politically acceptable because it tends to define an empty box: apart from ratemaking, it is difficult to think of many fact issues in rulemaking that are both specific in nature, and also crucial to the decision being made.

A second general observation is that the transition costs of adapting to a new procedural regime, which are likely to be considerable in any event, can be greatly magnified when the procedures in question are prescribed by a handcrafted "hybrid" statute. Inevitably, legislation leaves unresolved a great many matters of detail and interpretation. The difficulties of filling in these gaps are multiplied when the procedures fall between the established models of formal and informal rulemaking. There is no clear, generally accepted conceptual model for such a procedure, and at the same time there are some very strong tactical incentives for the actors to push toward one extreme or the other. Increased friction, uncertainty, and delay are the likely results. The APA rulemaking procedures may not be perfect, but at least they are familiar, and fit comfortably into the established conceptual structures of the legal profession.

There may also be some special transition costs if an agency is required to apply novel hybrid rulemaking procedures to a large number of rules that are already in various stages of development. With a dozen or more rules "in the pipeline" at the time when Magnuson-Moss was enacted, the FTC faced an unhappy choice. It could have put most of these rules on "hold" while it ran a few proceedings through the process to get the "bugs" out. This course of action would have meant delaying the pending rules for an additional year or more; during this interval, the evidence would have gotten stale, the staff assigned to the rule probably would have moved on to other things or other jobs, the abuses would have gone uncorrected, and, perhaps most important, the agency would have been the target of considerable public and congressional criticism.[212] The alternative, which was the option that the FTC took, was to push the rules forward as quickly as possible, once the Rules of Practice were in place. This raised the stakes enormously: a misreading of the statute might jeopardize not one or two rules, but a dozen. Recognizing this danger, the FTC may have been inclined to read the statute liberally and give interest persons a little more than the ACT really required when they pushed for additional procedural rights. In addition, the backlog of rules that built up during the year in which the Commission was developing Rules of Practice under Magnuson-Moss trained the agency's management and support capabilities, sometimes beyond the breaking point. The "bunching" of rules that occurred even during this relatively brief period of delay may also have contributed to the perception that the FTC was trying to write rules governing every facet of economic life, and thus may have helped to spark the public and congressional backlash against the Commission. These dilemmas would not have arisen, or at least would not have been so severe, if the hybrid rulemaking requirements has been attached to a new grant of regulatory authority, rather than imposed upon an active, ongoing program.

A more basic question is whether hybrid rulemaking enhances or undermines agency accountability. In addressing this issue, it is useful to distinguish two different and potentially conflicting types of accountability: the technical accountability to reviewing courts and to professional or expert criticism that comes from reasoned, explained, and factually supported decisions; and the political accountability that comes from congressional, public, and media oversight. As previously noted, Magnuson-Moss generally emphasizes the kind of technical accountability associated with reasoned decison-making. In doing so, the statute may make it more difficult for the agency to be politically responsive, or to seek compromise and accommodation among contending interest groups. As the procedures move closer to the adjudicative model, the agency may find that legal doctrines such as the prohibition on *ex parte* contacts and the rules against bias or prejudgment cut off the dialogue between the regulators and the regulated, and constrict congressional oversight. The requirement that the final rule must be the product of the reasoned decision based on a defined record also makes political responsiveness to the concerns of constituency groups or to members of Congress difficult: since such considerations are formally irrelevant to the decision, any overt attempt by the agency to take them into account may be grounds for reversal.[213] Complex, formalized procedures may also focus the decision-makers' attention on matters of process rather than substance. When substance is considered, the issues may be styled as matters of formal sufficiency rather than practical effectiveness; the inquiry may be focused on whether staff has proved its case by substantial evidence, rather than on whether the rule is something sensible that everybody can live with. Finally, to the extent that formal procedures lengthen the process, they may unduly postpone whatever residual opportunity the agency has to be politically responsive. If the agency heads cannot easily interject themselves into a proceeding until after several years have passed, they will most likely appear to be heedless of the wishes of Congress or constituency groups. By that time, the conflict may have escalated considerably, perhaps irreparably.

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[212] It should be recalled that the Commission was subjected to intense congressional criticism as early as February of 1976 for delay in its TRR proceedings, even though the Commission had elected to press forward with a large number of proceedings. *See generally Oversight Hearings into the Federal Trade Commission-Bureau of Consumer Protection. Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 94th Cong., 2d Sess. (1976).

A separate dimension of political accountability is the effect of the process on the personal incentives of the relevant policymaking officials. During the five-year period covered by this study, the FTC experienced a high rate of turnover at all levels, especially among Commissioners and Bureau Directors. This is certainly not uncommon for government agencies, but long and complex administrative procedures can further dilute the limited individual responsibility for bad policy decisions that government officials now have. If it is possible to build a reputation by launching ambitious projects then moving on to better things before the defects in the original proposal become manifest, then there is a positive incentive for bad or excessive regulation. A process which delays decisions until the architects of a policy have insulated themselves by job changes, or which creates procedural excuses for regulatory failures, is not conducive to a sense of personal responsibility for the shortcomings in regulatory programs.

Procedural "hybridizing" may also be an overly tempting way for legislators to compromise fundamental differences in regulatory legislation.

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[213] *See, e.g.,* D.C. Federation of Civic Ass'ns v. Volpe, 459 F. 2d 1231 (D.C. Cir.), *cert. denied,* 405 U.S. 1030 (1972).

Procedural problems have low visibility, long latency periods, and questionable causation; it is frequently impossible to separate errors in implementation from basic defects in the design of the procedures themselves. But procedures can contribute significantly to the delay or frustration of regulatory programs. The result may be an illusion of reform: ostensibly broad powers which cannot be exercised effectively. In the long run, this condition seems likely to breed cynicism and resentment toward regulation, if not toward government.

While formalized procedures seem to make it more difficult for agencies to be politically responsive, it is not clear that hybrid hearing procedures, by themselves, will necessarily enhance technical accountability. The FTC's implementation of the Magnuson-Moss Act demonstrates that a hybrid rulemaking procedure will not necessarily confine agency discretion; it may simply make it more difficult and expensive for the agency to exercise the discretion it has (or thinks it has). If the real problems with discretionary grants of rulemaking authority is concern about the quality or content of the decisions it is likely to make, then it seems preferable to address that question more directly. When detailed statutory specifications of regulatory goals and policies is impracticable, the most promising alternative may be to focus on the substantive components of decision-making rather than the hearing procedures. Agencies could be compelled to give serious consideration to the suggestions and criticisms of interested persons through refinements of the "cogent comment" doctrine. Similarly, the requirement that agencies prepare a regulatory analysis could be developed and elaborated as a means of assuring that there is justification for a particular exercise of regulatory power. The FTC's experience suggests that implementation of these requirements will not be easy or cheap, but at least they seem to be more promising alternatives than the effort to specify hybrid hearing requirements.

DATA APPENDICES

APPENDIX A

NUMBER OF PERSONS AT CERTAIN STAGES OF THE "CORE" TRR PROCEEDINGS BY CONSTITUENT INTEREST, DECEMBER 1, 1979

TABLE 1 — CARE LABELING

	Disputed Issues Proposal	Hearing Testimony	Rebuttal	Pre-Hearing and Hearing Motions	Post-Record Comments	Oral Argument
Unknown	—	—	—	—	1	1
Individual Consumer	—	5	—	—	20	
Consumer Group	—	1	1	—	1	1
Retail/Fee Professional	—	6	—	—	16	
Manufacturer/Wholesale Supplier	3	14	3	—	15	3
Trade/Professional Association	7	15	10	—	25	8
Consumer Protection Agency	—	8	—	—	2	
Occupational Licensing Board	—	—	—	—	—	
Executive/Legislative/ Attorneys General	—	—	—	—	2	
Experts	—	13	—	—	10	1
Other	—	1	1	—	3	
Total	10	63	14	0	95	14

TABLE 2 — FOOD ADVERTISING

	Disputed Issues Proposal	Hearing Testimony	Rebuttal	Pre-Hearing and Hearing Motions	Post-Record Comments	Oral Argument
Unknown	3	—	—	—	1	N/A
Individual Consumer	—	6	—	—	93	
Consumer Group	1	8	1	—	8	
Retail/Fee Professional	1	5		—	3	
Manufacturer/Wholesale Supplier	19	8	4	1	22	
Trade/Professional Association	17	14	4	22	25	
Consumer Protection Agency	—	1	—	—	1	
Occupational Licensing Board	—	2	—	—	—	
Executive/Legislative/ Attorneys General	1	5	—	—	—	
Experts	3	84	10	—	9	
Other	1	6	3	—	5	
Total	46	139	20	23	166	

Table 3 — Funeral Practices

	Disputed Issues Proposal	Hearing Testimony	Rebuttal	Pre-Hearing and Hearing Motions	Post-Record Comments	Oral Argument
Unknown	—	—	—	—	—	—
Individual Consumer	—	47	2	—	577	—
Consumer Group	—	24	4	1	65	4
Retail/Fee Professional	1	72	29	3	160	—
Manufacturer/Wholesale Supplier	—	5	—	—	—	—
Trade/Professional Association	4	16	6	21	16	7
Consumer Protection Agency	—	6	—	—	6	1
Occupational Licensing Board	—	30	—	1	11	—
Executive/Legislative/ Attorneys General	—	33	1	30	2	
Experts	—	47	2	—	2	—
Other	—	47	2	—	94	—
Total	5	327	46	26	961	14

Table 4 — Hearing Aids

	Disputed Issues Proposal	Hearing Testimony	Rebuttal	Pre-Hearing and Hearing Motions	Post-Record Comments	Oral Argument
Unknown	—	—	—	—	1	
Individual Consumer	—	31	—	—	64	
Consumer Group	—	18	1	1	2	2
Retail/Fee Professional	—	72	—	—	272	
Manufacturer/Wholesale Supplier	4	14	—	4	6	
Trade/Professional Association	3	8	3	40	22	3
Consumer Protection Agency	—	8	—	—	6	
Occupational Licensing Board	—	6	—	—	7	
Executive/Legislative/ Attorneys General	—	11	—	—	21	
Experts	—	25	1	—	22	
Other	—	6	—	—	27	—
Total	7	199	5	45	450	5

TABLE 5 — HOLDER IN DUE COURSE

	Disputed Issues Proposal	Hearing Testimony	Rebuttal	Pre-Hearing and Hearing Motions	Post-Record Comments	Oral Argument
Unknown	1	—	1	—	—	
Individual Consumer	—	1	—	—	—	
Consumer Group	—	—	1	1	3	1
Retail/Fee Professional	3	13	2	1	6	
Manufacturer/Wholesale Supplier	—	1	—	—	—	
Trade/Professional Association	2	6	2	5	8	4
Consumer Protection Agency	—	7	—	—	1	
Occupational Licensing Board	—	—	—	—	—	
Executive/Legislative/ Attorneys General	—	2	—	—	2	2
Experts	—	5	—	—	1	
Other	—	—	—	—	3	
Total	6	35	6	6	24	7

TABLE 6 — OPHTHALMIC GOODS AND SERVICES

	Disputed Issues Proposal	Hearing Testimony	Rebuttal	Pre-Hearing and Hearing Motions	Post-Record Comments	Oral Argument
Unknown	1	—	—	—	3	—
Individual Consumer	—	11	—	—	18	—
Consumer Group	—	15	4	—	2	2
Retail/Fee Professional	1	72	—	—	14	—
Manufacturer/Wholesale Supplier	—	1	—	—	—	—
Trade/Professional Association	2	16	5	4	12	3
Consumer Protection Agency	—	10	—	—	1	—
Occupational Licensing Board	2	10	—	—	5	—
Executive/Legislative/ Attorneys General	—	14	—	—	2	—
Experts	—	29	1	—	—	—
Other	—	8	—	—	2	—
Total	6	186	10	4	59	5

TABLE 7 — PROTEIN SUPPLEMENTS

	Disputed Issues Proposal	Hearing Testimony	Rebuttal	Pre-Hearing and Hearing Motions	Post-Record Comments	Oral Argument
Unknown	1	—	—	—		N/A
Individual Consumer	—	5	—	—		
Consumer Group	—	5	1	—		
Retail/Fee Professional	—	1	—	—		
Manufacturer/Wholesale Supplier	8	—	1	1		
Trade/Professional Association	3	2	—	2		
Consumer Protection Agency	—	2	—	—		
Occupational Licensing Board	—	—	—	—		
Executive/Legislative/ Attorneys General	—	2	—	—		
Experts	—	33	—	—		
Other	2	1	—	—		
Total	14	51	2	3		

* Post-record Comments were not available in December of 1979 when the TRR record was reviewed.

APPENDIX B

LENGTH OF REBUTTAL PERIODS IN TRADE REGULATION RULEMAKING PROCEEDINGS

Rule	Start*	End	# of days
Care Labeling	1/14/77	3/1/77	46
Credit Practices	1/14/77	3/1/77	46
Food Advertising	1/13/77	4/15/77	92
Funerals	8/7/76	10/26/77	80
Health Spas	3/15/78	4/14/78	30
Hearing Aids	8/19/76	10/22/76	64
HIDC	4/10/76	5/28/76	48
Mobile Homes	2/1/78**	7/5/78	155
Ophthalmic Goods	9/10/76	11/15/76	66
OTC Drugs	4/2/77	6/17/77	76
Protein Supplements	11/11/76	1/31/77	81
R-Value	3/10/78	4/17/78	38
Used Cars	5/5/77	8/31/77	118
Vocational Schools	1/30/76	2/28/76	30
Average			69 days

* The day after the close of hearings.

** The hearings were re-opened for one day on 6/9/78.

APPENDIX C

PROPORTION OF RULEMAKING RECORDS CONSTITUTING REBUTTAL SUBMISSIONS

Rule	Total Number of Pages	Total Number of Rebuttal Pages	% of Rulemaking Record Devoted to Rebuttal
Care Labeling	11,409	541	2.5%
Credit Practices	207,921	4,250	2.0%
Food Advertising	76,188	500	0.6%
Funerals	66,334	4,023	6.0%
Health Spas	51,829	662	1.2%
Hearing Aids	53,834	4,258	7.9%
HIDC	9,425	122	1.2%
Mobile Homes	261,405	2,798	1.0%
Ophthalmic Goods	31,779	201	0.6%
OTC Drugs	15,359	1,977	12.8%
Protein Supplements	17,855	1,737	9.7%
R-Value	9,709	1,232	12.7%
Used Cars	71,694	180	0.2%
Vocational Schools	111,695	68	0.1%

APPENDIX D

ORAL PRESENTATIONS, DECEMBER 1979

TABLE 1 — CARE LABELING TRR

Name of Speaker	Constituent Interest	Filed Notification of Interest	Group Representative[1]	Compensated by Magnuson-Moss
1. American Apparel Manufacturers Ass'n.	Trade/Prof. Ass'n.	Yes	NA	No
2. National Retail Merchants Ass'n.	Trade/Prof. Ass'n.	Yes	NA	No
3. American Textile Manufacturers Institute	Trade/Prof. Ass'n.	Yes	NA	No
4. Textile Distributors Ass'n.	Trade/Prof. Ass'n.	Yes	NA	No
5. Carpet & Rug Institute	Trade/Prof. Ass'n.	Yes	NA	No
6. National Ass'n. of Furniture Manufacturers/Southern Furniture Manufacturers Ass'n.	Trade/Prof. Ass'n.	Yes	NA	No
7. International Fabricare Institute	Trade/Prof. Ass'n.	Yes	NA	No
8. National Consumers League	Consumer Group	Yes	NA	Yes*
9. Clorox Co.	Manufacturer/ Whole/Supplier	Yes	NA	No
10. Packaging Systems Corporation	Manufacturer/ Whole/Supplier	No	NA	No

TABLE 1 — CARE LABELING TRR—Continued

Name of Speaker	Constituent Interest	Filed Notification of Interest	Group Representative[1]	Compensated by Magnuson-Moss
11. Ruth Taylor	expert	No	NA	No
12. American Yarn Spinners Ass'n.	Trade/Prof. Ass'n.	No	NA	No
13. Waldes-Kohinoor, Inc.	Manufacturer/ Whole/Supplier	Yes	NA	No
14. Jerome Shapiro	Other	No	NA	No

* Compensation for participation in proceeding did not include cost of participating in oral presentation.

1. NA, meaning "Not Applicable", is used to indicate that interested persons were not consolidated into groups, with group representatives appointed by the Presiding Officer.

TABLE 2 — FUNERAL PRACTICES TRR

Name of Speaker	Constituent Interest	Filed Notification of Interest	Group Representative[1]	Compensated by Magnuson-Moss
1. Marty Russo	Exec/Legis/ AG	No	NA	No
2. NRTA/AARP	Consumer Group	Yes	NA	No
3. National Selected Morticians	Trade/Prof. Ass'n.	Yes	NA	No
4. U.S. Small Business Administration	Exec/Legis/ AG	No	NA	No
5. N.Y. State Consumer Protection Board	Consumer Protection agency	No	NA	No
6. International Order of Golden Rule	Trade/Prof. Ass'n.	No	NA	No
7. Cremation Ass'n. of North America	Trade/Prof. Ass'n.	Yes	NA	Yes**
8. ADA/National Council for Senior Citizens (joint)	Consumer Group	Yes	NA	Yes**
9. National Funeral Directors Ass'n.	Trade/Prof. Ass'n.	Yes	NA	No
10. Continental Ass'n of Funeral & Memorial Societies	Consumer Group	Yes	NA	Yes*
11. National Funeral Directors & Morticians Ass'n.	Trade/Prof. Ass'n.	No	NA	No
12. N.Y. State PIRG Ass'n.	Consumer Group Ass'n.	No	NA	Yes**
13. Pre-Arrangement Interment Ass'n. of American	Trade/Prof. Ass'n.	Yes	NA	No
14. California Citizen Action Group	Consumer group	Yes	NA	Yes*

* Compensation for participation in proceeding did not include cost of participating in oral presentation.

** Compensation included cost of participating in oral presentation.

1. NA, meaning "Not Applicable", is used to indicate that interested persons were not consolidated into groups, with group representatives appointed by the Presiding Officer.

TABLE 3 — HEARING AIDS TRR

Name of Speaker	Constituent Interest	Filed Notification of Interest	Group Representative	Compensated by Magnuson-Moss
1. Organization for the Use of the Telephone	Consumer Group	No	No	No
2. National Council of Senior Citizens	Consumer Group	Yes	Yes	Yes*
3. National Hearing Aid Society	Trade/Prof. Ass'n.	Yes	Yes	Yes*
4. American Speech & Hearing Ass'n.	Trade/Prof. Ass'n.	Yes	Yes	No
5. Hearing Industries Assn. (formerly HAIC)	Trade/Prof.	Yes	Yes	No

* Compensation for participation in proceeding did not include cost of participating in oral presentation.

TABLE 4 — HOLDER IN DUE COURSE AMENDMENT

Name of Speaker	Constituent Interest	Filed Notification of Interest	Group Representative	Compensated by Magnuson-Moss
1. Division of Consumer Affairs, Federal Reserve Board	Exec./Legal/ AG	NA	No	No
2. National Consumer Finance Ass'n.	Trade/Prof. Ass'n.	NA	Yes	No
3. National Consumer Law Center — Boston	Consumer group	NA	Yes	Yes*
4. Credit Union National Ass'n.	Trade/Prof. Ass'n.	NA	No	No
5. American Bankers Ass'n. Consumer Bankers Ass'n. Independent Bankers Ass'n.	Trade/Prof. Ass'n.	NA	No	No
6. Ass't. AG for Consumer Affairs, State of Mass.	Exec./Legis./ AG	NA	No	No
7. U.S. League of Savings Ass'ns.	Trade/Prof.	NA	No	No

* Compensation for participation in proceeding did not include cost of participating in oral presentation.

TABLE 5 — OPHTHALMIC GOODS TRR

Name of Speaker	Constituent Interest	Filed Notification of Interest	Group Representative	Compensated by Magnuson-Moss
1. American Optometric Ass'n.	Trade/Prof. Ass'n.	Yes	Yes	No
2. California Citizen Action Group	Consumer group	Yes	Yes	Yes**
3. National Ass'n. of Optometrists & Opticians	Trade/Prof. Ass'n.	Yes	Yes	No
4. Opticians Ass'n. of America	Trade/Prof. Ass'n.	No	No	No
5. Americans for Democratic Action	Consumer groups	Yes	Yes	Yes**

** Compensation included cost of participating in oral presentation.

EXPLANATION OF THE DATA BASE FOR APPENDICES E–H

The source of the data presented in Appendices E–H is the Federal Trade Commission's computerized Case/Project Tracking System (CPTS), and printouts and monthly status reports containing information from that system. The manhour totals reflect only the work of the FTC's professional staff: the presiding officers, the staff attorneys, the research analysts, and the consumer protection specialists. Not included are manhours for the work of clerical, secretarial and other support personnel, nor the work of consultants hired by the Commission. Except for Appendix F, the manhour totals have been rounded off to the nearest hundred manhours.

Certain limitations of the CPTS data must be taken into account when interpreting the figures presented in these appendices. A major limitation is that the manhours for the various stages of the rulemaking proceedings were determined after the fact, using internal monthly status reports which gave only the total number of manhours reported as of the end of the preceding month. Consequently, if a rulemaking event (*e.g.,* start of hearings) took place in the middle of a month, it was impossible to determine from these reports the precise number of manhours reported prior to the date of the event. This problem was eliminated in some instances by use of supplemental printouts of CPTS data obtained from the FTC on ten occasions during the ACUS study (Jan. 27, June 23, Aug. 5, Oct. 14, and Dec. 10, 1976; Apr. 1, June 8, Aug. 8, Aug. 3, and Sept. 12, 1977; and May 15, 1978.) When the problem could not be eliminated using the supplemental printouts, the following convention was used to estimate the number of hours worked prior to the rulemaking event: if the rulemaking event occurred within 7 days before or after the end of a month, the manhour total reported in the monthly status report for that month was used. This convention would produce conservative estimates in many cases, but the long time periods between rulemaking events in most proceedings probably helped to minimize the error. Equally important as a limitation, however, was the lack of information concerning possible time lag in staff reporting of manhours to the system or about the accuracy of the data reported. Thus, the estimates given in Appendices E–H can only be considered general indicators of the number of manhours actually expended by the FTC staff at any point in the rulemaking process.

The data for the prehearing stage of the rulemaking proceedings are the least complete. The monthly status reports containing CPTS manhour statistics were not produced until October of 1976, several months after most of the Initial Notices of Rulemaking were published. Even with the use of the supplemental printouts, it was often impossible to obtain even a rough estimate of the number of manhours reported by a given point in the prehearing stage. This shortage of data was compounded by discrepancies in the treatment of a pre-Initial Notice manhours expended by the various rulemaking staffs. In theory, separate computer files are established for pre-rulemaking investigation activity (the 7-digit file) and activity associated with the public rulemaking proceeding (an "R"-numbered file.) While many staffs appear to have followed this policy and reported only post-Initial-Notice manhours to the rulemaking file, other staffs apparently logged manhours worked prior to the Initial Notice to the rulemaking file. For example, 5,900 manhours had already been reported to the Food Advertising rulemaking file by the time the Initial Notice was published, and in Hearings Aids, 2,700 manhours had been reported to the rulemaking file by January of 1976, six months before the Initial Notice was published (*see* Appendix H, Charts 3 and 6, respectively). By contrast, in Funeral Practices and Protein Supplements, the rulemaking files were opened at the time of the Initial Notice, and accumulated pre-Initial Notice manhours were not reported to those rulemakingfiles (Appendix H, Charts 4 and 12, respectively.)

Therefore, Appendices E and G may reflect some pre-Initial Notice staff activity for certain proceedings; at the same time, substantial numbers of manhours reported to the separate 7-digit investigation files of other rules are not included. For example, printouts obtained from the FTC on December 10, 1976 and April 1, 1977, revealed the following number of manhours logged to the investigation files of several proceedings: Mobile Homes, 4,858 manhours;

Funeral Practices, 4,066 manhours; Hearing Aids, 1,338 manhours; Protein Supplements, 4,664 manhours; Prescription Drugs, 10,032 manhours, and Ophthalmic Goods, 2,956 manhours. These manhour totals were not added to the data in Appendices E–H because (1) it is not clear that all of the manhours related specifically to rulemaking, (2) the same data were not readily obtainable for many proceedings, and (3) there is no way of knowing if duplication exists in the manhours reported to the investigation and rulemaking files. Nevertheless, it should be noted that the decision to exclude investigation file data errs on the side of underreporting the total number of manhours worked in a given rulemaking proceeding.

APPENDIX E

MANHOURS REPORTED BY FTC STAFF AT VARIOUS STAGES OF TRR PROCEEDINGS

(As of Jan. 16, 1980)*

Rule Name	Initial Notice to Final Notice	Final Notice to Start of Hearing	Start of Hearing to End of Hearing	End of Hearing to P.O. Report	P.O. Report to Staff Report	Staff Report to Oral Presentation	Oral Presentation to Publication of TRR
Care Labeling	—	—	600	2,900	1,600	2,200	N/A
Credit Practices	7,000	3,400	4,400	6,200	N/A		
Food Advertising	5,600	3,500	6,000	7,500	2,500	N/A	
Funeral Practices	—	—	3,600	8,400	2,700	2,800	N/A
Health Spas	8,400+	3,800	2,100	6,800	N/A		
Hearing Aids	—	3,500	3,500	7,000	7,000	2,300	N/A
Holder in Due Course	300	1,500	—	5,500	1,500	1,800	N/A
Mobile Homes	8,100+	3,900	3,900	12,500	N/A		
Ophthalmic Goods	—	—	—	2,200	2,000	600	1,000
OTC Drugs	2,300+	3,900	1,600	7,500	900	N/A	
OTC Antacids	7,700+	1,600	1,300	4,300	N/A		
Protein Supplements	2,700	1,400	4,100	2,200	5,600	N/A	
Used Cars	6,000	4,400	5,000	9,200	1,200	2,000	N/A
Vocational Schools	—	—	—	—	200	1,100	3,900
Average total manhours per stage	5,300	3,100	6,000	6,300	2,500	1,800	2,500

* This chart includes all TRR proceedings conducted under the FTC's Rules of Practice, except for the Prescription Drugs and Cellular Plastics proceedings, which were terminated by the Commission.

— means data were not available.

N/A means the TRR had not completed the stage by Jan. 16, 1980.

+ indicates a rough, but conservative, estimate (*see* individual TRR manhour charts, Data Appendix H).

APPENDIX F

TOTAL MANHOURS REPORTED BY FTC STAFF IN TRADE REGULATION RULEMAKING PROCEEDINGS*

Rule Name	Number of Manhours Reported by Publication of Final TRR on Jan. 16, 1980
1. Care Labeling Amendment	13,064
2. Credit Practices	27,041
3. Food Advertising**	33,325
4. Funeral Practices	29,113
5. Health Spas	23,414
6. Hearing Aids	30,483
7. Holder in Due Course Amendment	12,446
8. Mobile Homes	33,717
9. Ophthalmic Goods	12,600 (final rule published)
10. OTC Drugs	17,058
11. OTC Antacids	17,025
12. Protein Supplements	16,705
13. "R"-Value	10,700 (final rule published)
14. Used Cars	32,537
15. Vocational Schools	19,700 (final rule published)
Average Total Manhours Per Rule	22,062
Average Total Man-months Per Rule	125
Average Total Man-years Per Rule	10.4

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* This list does not include two rules which were terminated in the early stages by the Commission (Prescription Drugs and Cellular Plastics) or three rules which had not advanced far enough to provide useful data (Children's Advertising, Standards and Certification and the Games of Chance Amendment.) All of the proceedings listed had reached the point of publication of the Presiding Officer's report, but final rules were published in only three proceedings.

** Total does not include manhours separately reported to Phase II of the Food Advertising TRR.

APPENDIX G

Distribution of Manhours in the Three Major Stages of TRR Proceedings

Rule Name	Prehearing Stage (Up to start of hearing[1])	Hearing Stage	Post hearing Stage (End of hearing to final rule on Jan. 16, 1980)
1. Care Labeling	4,400 (34%)	600 (5%)	8,100 (62%)
2. Credit Practices	10,400 (39%)	4,400 (16%)	12,200 (45%)
3. Food Advertising	15,000 (45%)	6,000 (18%)	12,300 (37%)
4. Funeral Practices	8,000 (27%)	3,600 (12%)	17,500 (60%)
5. Health Spas	12,700 (54%)	2,100 (9%)	8,600 (38%)
6. Hearing Aids	9,000 (30%)	3,500 (11%)	18,000 (59%)
7. Holder in Due Course	2,800 (23%)	—[2] (4%)	9,000 (73%)
8. Mobile Homes	14,400 (43%)	3,900 (12%)	15,400 (46%)
9. Ophthalmic Goods	—	—	5,800 (46%)
10. OTC Drugs	7,000 (37%)	1,600 (8%)	10,500 (55%)
11. OTC Antacids	9,900 (58%)	1,300 (8%)	5,800 (34%)
12. Protein Supplements	4,100 (25%)	4,100 (25%)	8,500 (50%)
13. R-Value	1,700 (16%)	900 (8%)	8,100 (76%)
14. Used Cars	13,900 (43%)	5,000 (15%)	13,600 (42%)
Proceeding Averages	8,700 (38%)	3,100 (14%)	10,900 (48%)

1. The cumulative total of manhours at the start of hearings probably includes pre-initial notice investigation manhours for some proceedings, but not others (*see* Explanation of Data in this appendix.).

2. The oral hearing in the Holder in Due Course Amendment proceeding took only 5 days. Therefore, it was impossible to determine the number of manhours reported for the hearing stage (*see* the individual manhour chart for that proceeding in this appendix.)

APPENDIX H

Manhours Reported by the FTC Staff

Chart 1 — Care Labeling

(<-------> Manhours by Stage (approx.))
(———— Cumulative Manhours)

1975	January	February	March	April	May	June	July	August	September	October	November	December
1976	January 26	February	March	April	May	June	July	August 25	September	October	November 8	December
	Initial Notice							Final Notice			Start of Hearing	
											< ----------	600 ----------
	————	————	————	————	————	————	————	————	————	————	4400	————
1977	January 13	February	March 1	April	May	June	July	August 25	September	October	November	December
	End of Hearing		Rebuttal Deadline					P.O. Report				
	--->	< ------- 900 ------->	< ----------	----------	----------	2,000 ----------	----------	---------->	< ----------	----------	1600 ----------	---------->
	——— 5,000	————	5,900 ————	————	————	————	————	————	7,900 ————	————	————	————
1978	January	February	March	April	May	June 19	July	August	September	October	November	December
						Staff Report						
	----------	----------	----------	----------	---------->	< ----------	----------	----------	---------- 2200	----------	----------	----------
	————	————	————	————	9500	————	————	————	————	————	————	————
1979	January	February	March	April	May	June	July 18, 25	August	September	October	November	December
							Oral Presentation Meeting to consider final rule					
	----------	----------	----------	----------	----------	---------->						
	————	————	————	————	————	———— 11,700	————	————	————	————	————	———— 13,064 (1/16/80)

CHART 2 — CREDIT PRACTICES

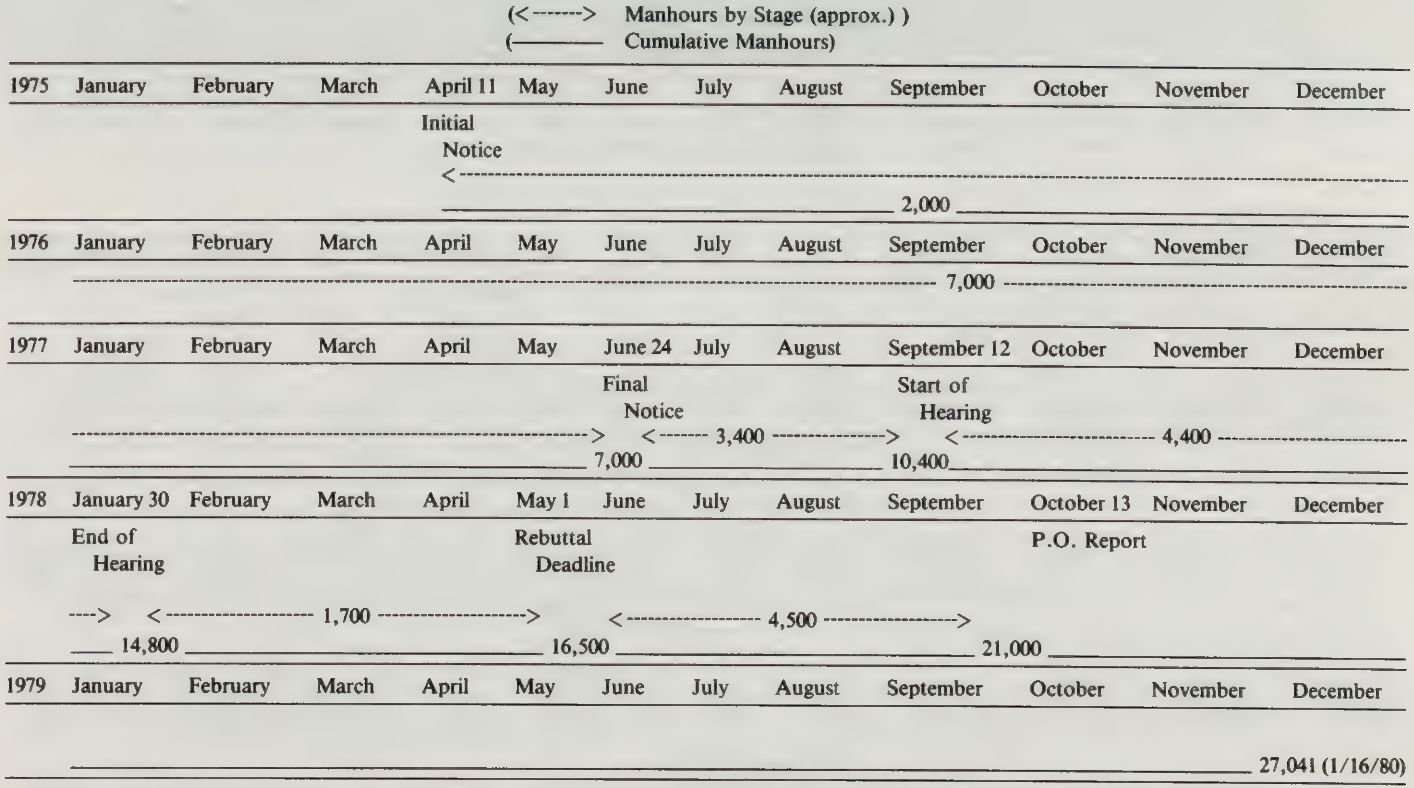


Chart 3 — Food Advertising

(<-------> Manhours by Stage (approx.))
(———— Cumulative Manhours)

1975	January	February	March	April 11	May 28	June	July	August	September	October	November	December
					Initial Notice							
					<--------	--------	--------	--------	5600	--------	--------	--------
	5100 ____	________	________	________	5900 ____	________	________	________	________	________	________	________
1976	January	February	March 2	April	May	June	July 12	August	September	October	November	December
			Final Notice				Start of Hearing					
	--------	------->	<--------	--------	3,500	------->	<--------	--------	--------	6,000	--------	--------
	________	________	11,500 ____	________	________	________	15,000 ____	________	________	________	________	________
1977	January 12	February	March	April 15	May	June	July	August	September	October	November	December
	End of Hearing			Rebuttal Deadline								
	--->	<--------	1600	------->	<--------	--------	--------	--------	5900	--------	--------	------->
	____ 21,000 ____	________	________	22,600 ____	________	________	________	________	________	________	________	________
1978	January	February	March 22	April	May	June	July	August	September	October	November 29	December
			P.O. Report								Staff Report	
	--------	--------	------->	<--------	--------	--------	--------	2,500	--------	--------	------->	
	________	________	28,500 ____	________	________	________	________	________	________	________	31,000 ____	________
1979	January	February	March	April	May	June	July	August	September	October	November	December
	________	________	________	________	________	________	________	________	________	________	________	33,325 (1/16/80)

Chart 4 — Funeral Practices

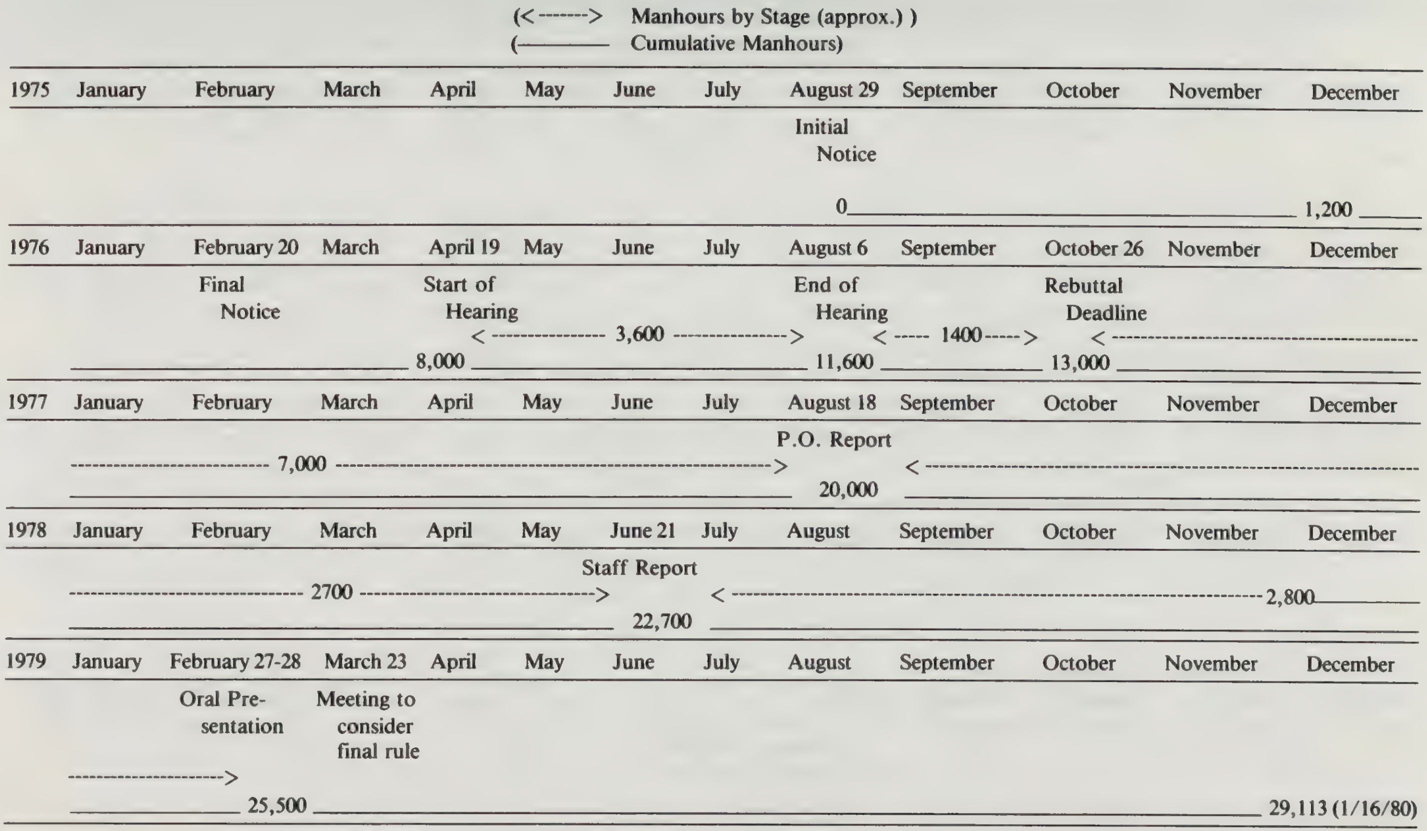
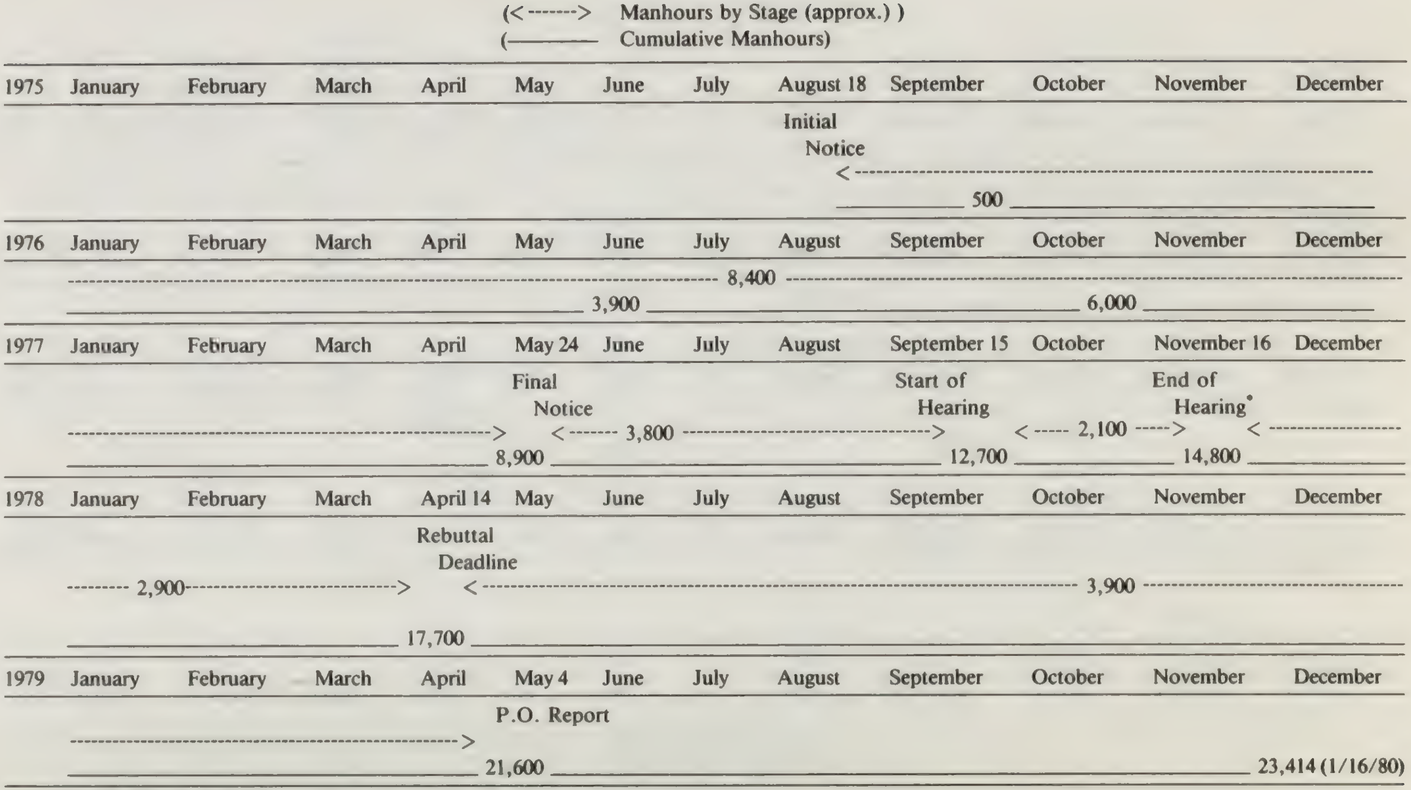


CHART 5 — HEALTH SPAS



* Does not include 2 additional days of hearings on March 13-14, 1978.

CHART 6 — HEARING AIDS

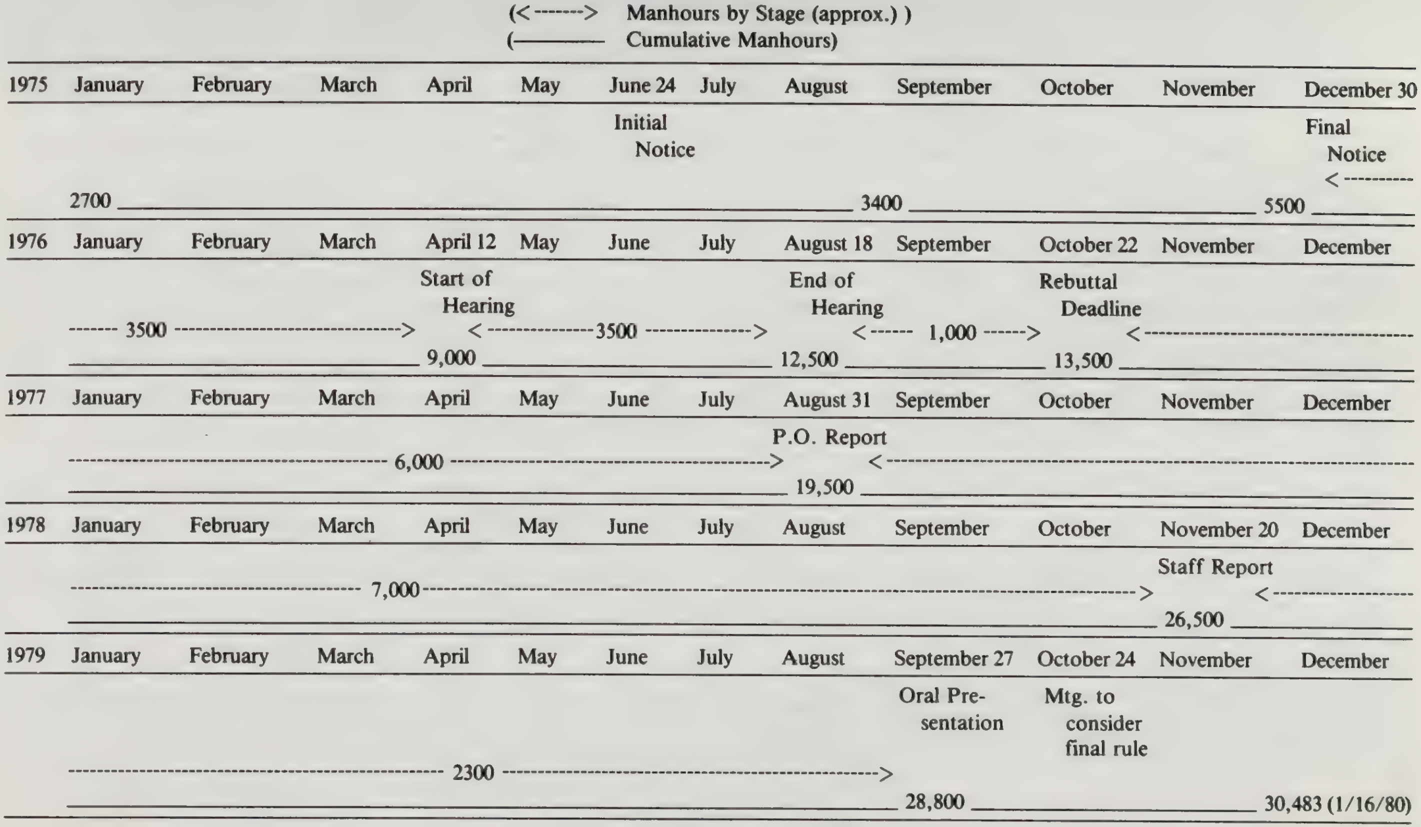

(<-------> Manhours by Stage (approx.))
(———— Cumulative Manhours)
1975 January February March April May June 24 July August September October November December 30
Initial Notice
Final Notice
2700
3400
5500
1976 January February March April 12 May June July August 18 September October 22 November December
Start of Hearing
End of Hearing
Rebuttal Deadline
3500
3500
1,000
9,000
12,500
13,500
1977 January February March April May June July August 31 September October November December
P.O. Report
6,000
19,500
1978 January February March April May June July August September October November 20 December
Staff Report
7,000
26,500
1979 January February March April May June July August September 27 October 24 November December
Oral Presentation
Mtg. to consider final rule
2300
28,800
30,483 (1/16/80)

CHART 7 — HOLDER IN DUE COURSE

(<-------> Manhours by Stage (approx.))
(———— Cumulative Manhours)

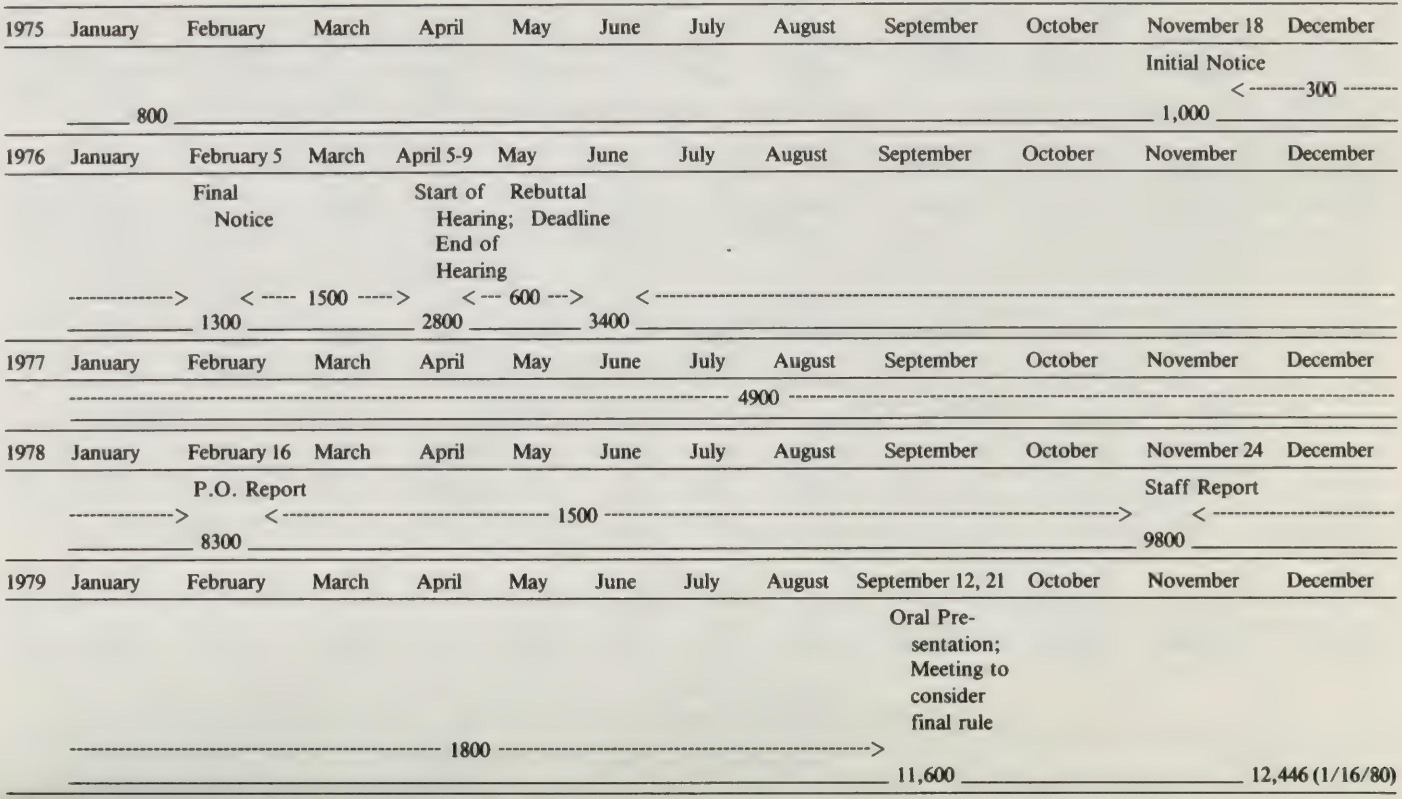
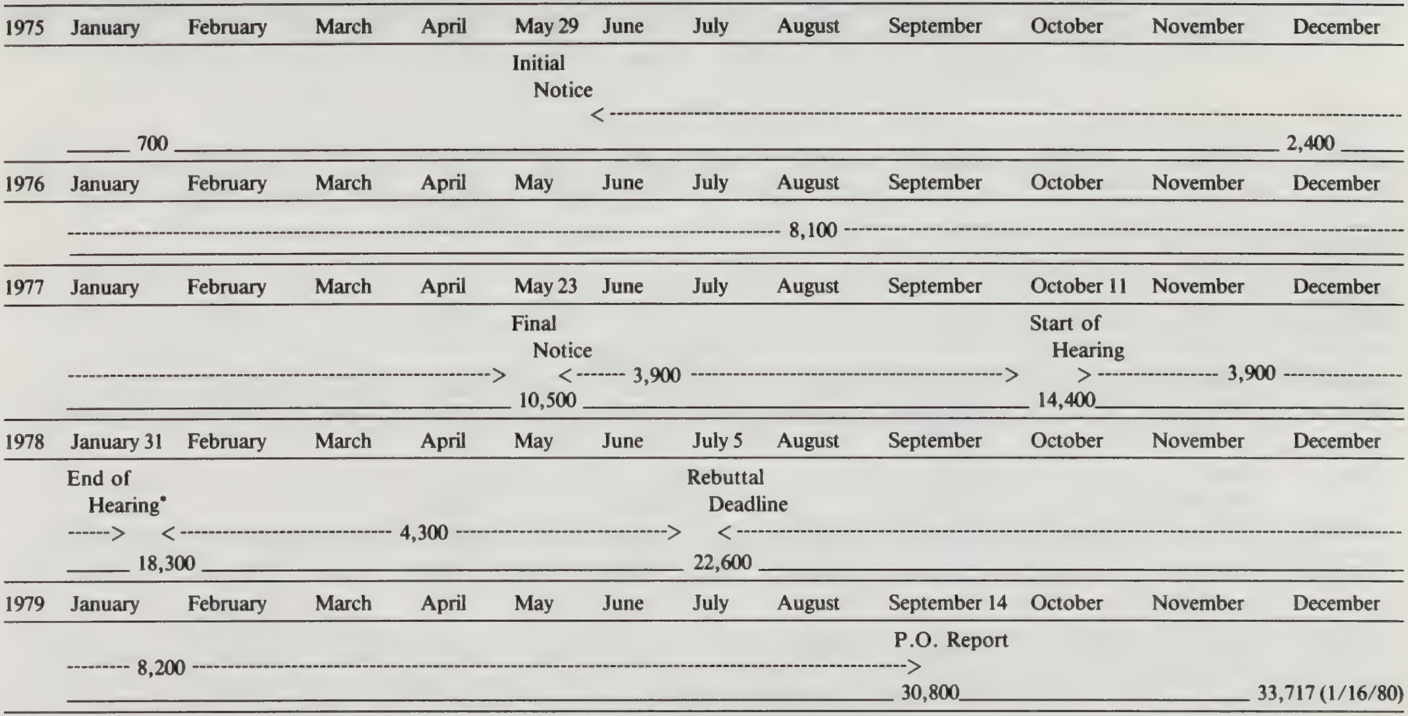


CHART 8 — MOBILE HOMES

(<-------> Manhours by Stage (approx.))
(———— Cumulative Manhours)



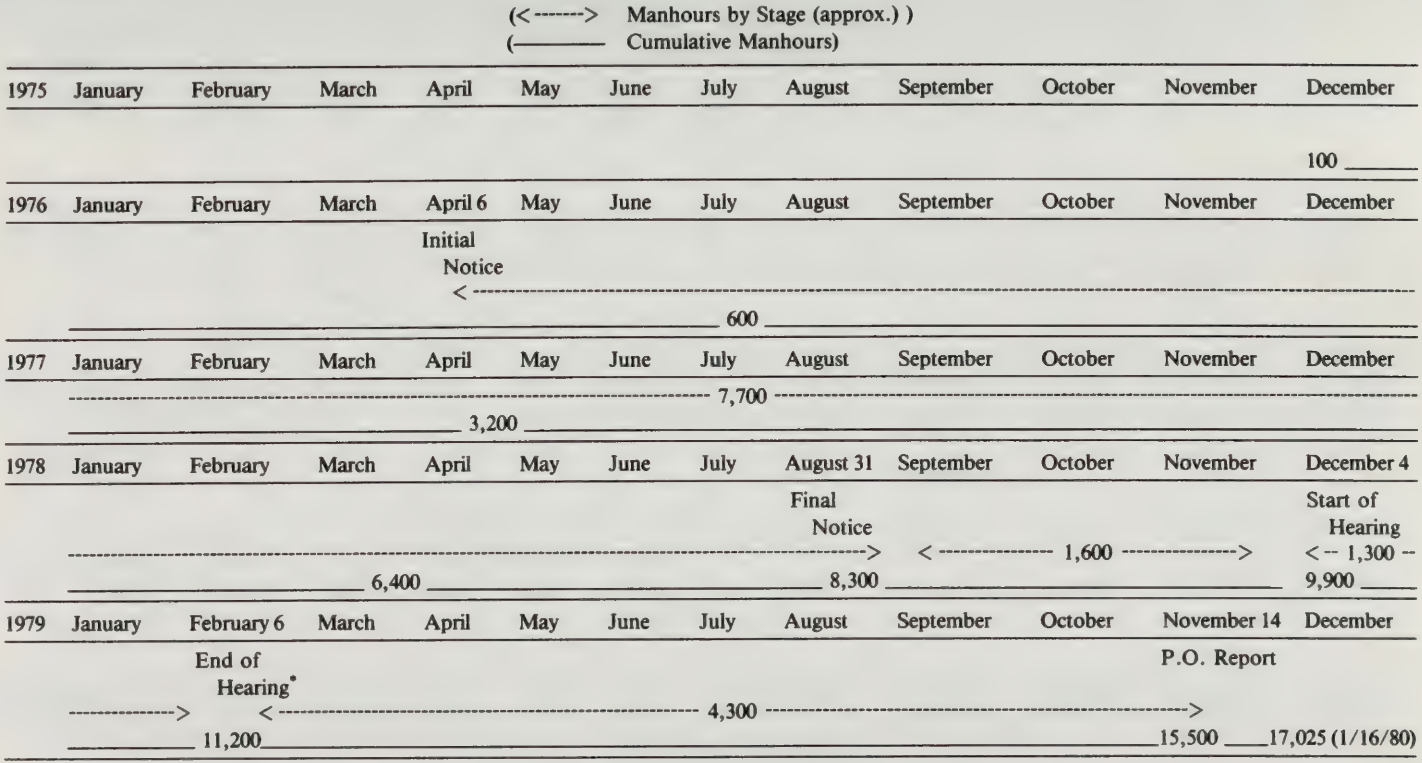
* One additional day of hearings was held on June 9, 1978.

CHART 9 — OPHTHALMIC GOODS

(<-------> Manhours by Stage (approx.))
(———— Cumulative Manhours)

1975	January	February	March	April	May	June	July	August	September	October	November	December
1976	January 16	February	March	April 2	May	June 7	July	August	September 9	October	November 15	December
	Initial Notice			Final Notice		Start of Hearing			End of Hearing		Rebuttal Deadline	
									<--------- 1200 --------->		<-------- 1000 --------	
									6800		8000	
1977	January 27	February	March	April	May	June 10	July	August	September	October	November	December 12
	P.O. Report					Staff Report						Oral Presentation Meeting to adopt final rule
	------>	<------- 2,000 ------->					<---------- 600 ---------->					<----------
	9000					11,000						11,600
1978	January	February	March	April	May	June 2	July	August	September	October	November	December
						SBP published						
	------------ 1000 ------------>											
						12,600						
1979	January	February	March	April	May	June	July	August	September	October	November	December

CHART 10 — OTC-ANTACIDS



* Excludes one additional day of hearings on April 19, 1979

CHART 11 — OTC DRUGS

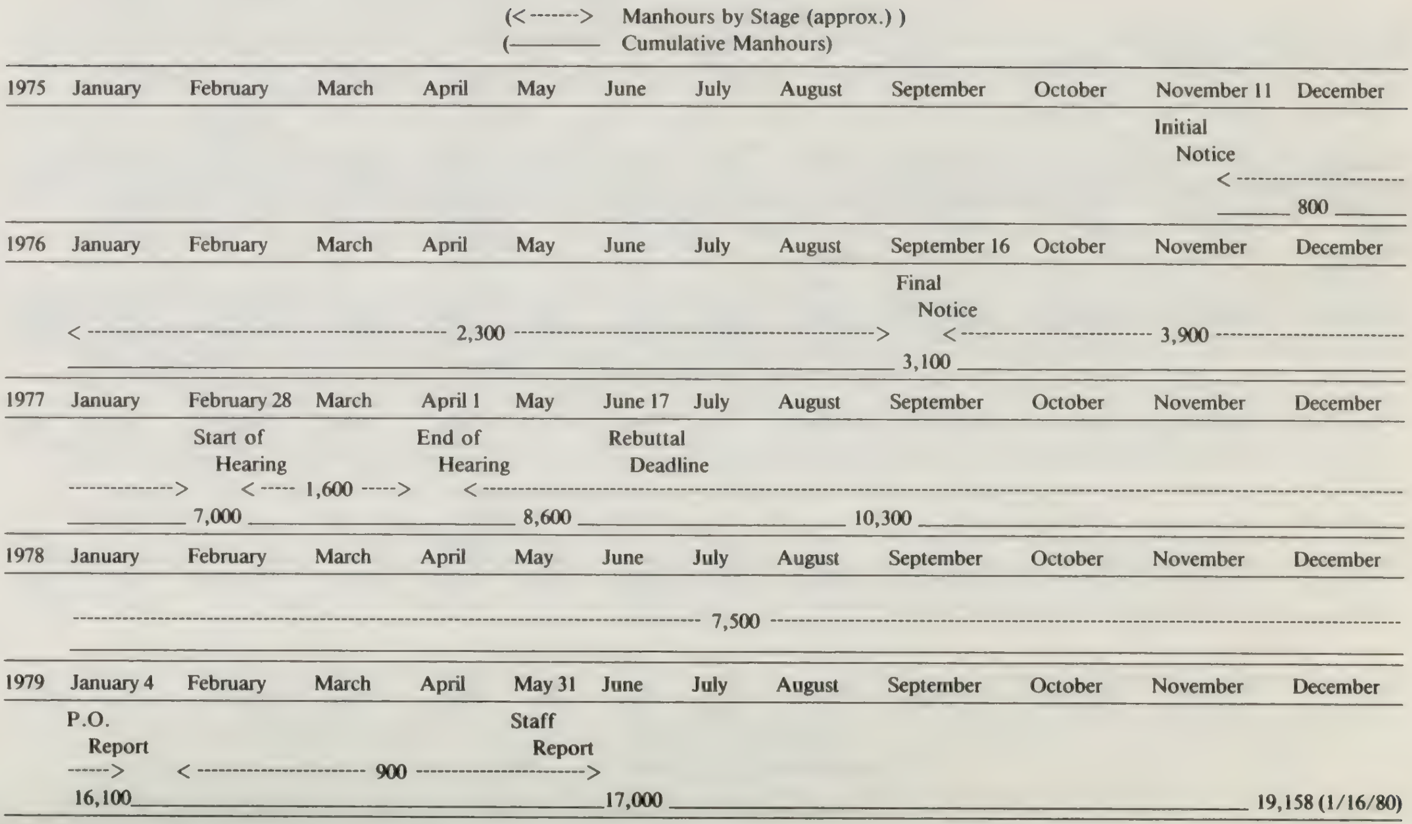


CHART 12 — PROTEIN SUPPLEMENTS

(<-------> Manhours by Stage (approx.))
(———— Cumulative Manhours)

1975	January	February	March	April	May	June	July	August	September 5	October	November	December
									Initial Notice			
									<-------	-------	2700	-------
									0 ———	———	———	———
1976	January	February	March 10	April	May 10	June	July	August	September	October	November 10	December
			Final Notice		Start of Hearing						End of Hearing	
	-------	------>	<---	1400 --->	<-------	-------	-------	4100	-------	------>	<-------	800 -------
	———	———	2700 ———	———	4100 ———	———	———	———	———	———	8200 ———	———
1977	January 31	February	March	April	May	June	July 31	August	September	October	November	December
	Rebuttal Deadline						P.O. Report					
	------>	<-------	-------	1400	-------	------>	<-------	-------	-------	-------	-------	-------
	——— 9000	———	———	———	———	———	10,400 ———	———	———	———	———	———
1978	January	February	March	April	May	June	July	August	September	October	November	December
	-------	-------	-------	-------	-------	-------	-------	-------	-------	-------	5600	-------
											———	———
1979	January	February	March	April	May	June	July 25	August	September	October	November	December
							Staff Report					
	-------	-------	-------	-------	-------	------>						
	———	———	———	———	———	——— 16,000	———	———	———	———	———	16,705 (1/16/80)

CHART 13 — "R"-VALUE

(<-------> Manhours by Stage (approx.))
(———— Cumulative Manhours)

1975	January	February	March	April	May	June	July	August	September	October	November	December
1976	January	February	March	April	May	June	July	August	September	October	November	December
1977	January	February	March	April	May	June	July	August	September	October	November 18	December
											Notice of Rulemaking	
											<---------- 1,700	----------
1978	January	February 13	March 9	April 17	May	June	July 25	August 22	September	October	November 21, 29	December
		Start of Hearing	End of Hearing	Rebuttal Deadline			Staff Report		P.O. Report		Oral Present.	1st Cm'n Meeting
	------------------>	<--- 900 --->		<----------------		4,200	---------------->	<--- 300 --->		<---------- 1,600 ---------->		
		1,700	2,600					6,000	7,100		8,700	
1979	January 24	February	March	April	May	June	July	August 27	September	October	November	December
	2d Cm'n Meeting							SB&P published				
	9,400									10,700		11,408 (1/16/80

CHART 14 — USED CARS

(<-------> Manhours by Stage (approx.))
(———— Cumulative Manhours)

1975	January	February	March	April	May	June	July	August	September	October	November	December
												— 3,500 —
1976	January 6	February	March	April	May	June	July	August	September 15	October	November	December 6
	Initial Notice								Final Notice			Start of Hearing
	------	------	------	------	6,000	------	------	------	------>	------ 4,400	------>	<------
	——	——	4,800	——	——	——	——	——	9,500	——	13,900	——
1977	January	February	March	April	May 4	June	July	August 31	September	October	November	December
					End of Hearing			Rebuttal Deadline				
	------	5,000	------	------>	<------	------	2,200	------>	<------	------	------	------
	——	——	——	——	18,900	——	——	21,100	——	——	——	——
1978	January	February	March	April	May	June 30	July	August	September	October	November 14	December
						P.O. Report					Staff Report	
	------	------	7,000	------	------>	<------	------	------	1,200	------>	<------	------
	——	——	——	——	——	28,100	——	——	——	——	29,300	——
1979	January	February	March	April	May	June	July	August	September 25	October 11	November	December
									Oral Present.	1st Cm'n Meeting		
	------	2,000	------	------	------	------	------	------>				
	——	——	——	——	——	——	——	——	31,300	——	——	32,537 (1/16/80)

CHART 15 — VOCATIONAL SCHOOLS

(<-------> Manhours by Stage (approx.))
(———— Cumulative Manhours)

1975	January	February	March	April	May 15	June	July	August	September 29	October	November	December 1
					Initial Notice				Final Notice			Start of Hearing
												9,800
1976	January 29	February 28	March	April	May	June	July	August	September	October 28	November	December
	End of Hearing	Rebuttal Deadline								P.O. Report		
										<	200	
				12,400						14,500		
1977	January 7	February	March	April	May	June	July	August	September	October	November	December
	Staff Report											
	------>	<						1,100				
	14,700							15,200				
1978	January 12, 31	February	March	April	May	June	July 12	August	September	October	November	December 28
	Oral Present.	1st Cm'n Meeting					2nd Cm'n Meeting					SB&P published
	------>	<						3,900				>
	15,800						17,000					19,700
1979	January	February	March	April	May	June	July	August	September	October	November	December

APPENDIX I

STATUS OF MAGNUSON-MOSS RULEMAKING PROCEEDINGS IN POST-HEARING STAGE*

(As of June 1, 1980)

	P.O.'s Report	Staff Report	Postrecord Comments	Revised Staff Recommendations	BCP Director's Recommendations	Oral Presentations	Commission Meeting	Final Rule Published
1. Ophthalmic Goods	Jan. 27, 1977	June 10, 1977	Aug. 12, 1977	—	Nov. 25, 1977	Dec. 7, 1977	Dec. 12, 1977	June 2, 1978
2. Vocational Schools	Oct. 28, 1976	Jan. 7, 1977	May 31, 1977		undated	Jan. 12, 1978	Jan. 31, 1978 July 12, 1978	Dec. 28, 1978
3. R-Value	Aug. 22, 1978	July 25, 1978	Sept. 22, 1978	Nov. 3, 1978	Nov. 9, 1978	Nov. 21, 1978	Nov. 29, 1978 Jan. 24, 1979	Aug. 27, 1979
4. Funeral Practices	Aug. 18, 1977	June 21, 1978	Sept. 20, 1978	Jan. 29, 1979	Feb. 2, 1979	Feb. 27–28, 1979	March 23, 1979	
5. Care Labeling Amendment	Aug. 25, 1977	June 19, 1978	Sept. 18, 1978	Feb. 23, 1979	June 15, 1979	July 18, 1979	July 25, 1979	
6. Holder in Due Course Amendment	Feb. 16, 1978	Nov. 24, 1978	Jan. 24, 1979 Re-opening of record, July 16, 1979 Request for comment on drafting, Nov. 15, 1979	May 25, 1979 Aug. 31, 1979 (following re-opening)	May 25, 1979 Aug. 30, 1979 (following re-opening)	Sept. 12, 1979	Sept. 21, 1979	
7. Used Cars	June 30, 1978	Nov. 14, 1978	Feb. 13, 1979	July 26, 1979	July 26, 1979	Sept. 25, 1979	Oct. 11, 1979 May 14, 1980	
8. Hearing Aids	Aug. 31, 1979	Nov. 28, 1978	Mar. 29, 1979	June 13, 1979	June 20, 1979	Sept. 27, 1979	Oct. 24, 1979	
9. Food Advertising	Mar. 22, 1978	Nov. 29, 1978	Feb. 26, 1979	July 18, 1979	Feb. 19, 1980	May 7, 1980	May 21, 1980	
10. OTC Drugs	Jan. 4, 1979	May 31, 1979	July 30, 1979					
11. Protein Supplements	July 31, 1978	July 25, 1979	Oct. 31, 1979					
12. Credit Practices	Oct. 13, 1978							
13. Health Spas	May 4, 1979							
14. Mobile Homes	Sept. 14, 1979							
15. OTC Antacids	Nov. 14, 1979							

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[*] The Games of Chance TRR amendment proceeding is excluded from this chart. Although in the posthearing stage (*see*Availability of the Presiding Officer's Report, 45 F.R. 24499), it involves a minor amendment to an existing TRR and is being conducted under experimental procedures.

APPENDIX J

TIME INTERVALS BETWEEN KEY STEPS IN THE POST-HEARING STAGE OF MAGNUSON-MOSS RULEMAKING*

(Date of chart: June 1, 1980)

Rule	End of hearing to PO Report	P.O. Report to Staff Report	Staff Report to PRC Deadline	PRC Deadline to BCP Director's Recommendations	BCP Director's Recommendatinos to Oral Presentation	Oral Presentation to Commission Meeting to Adopt	Commission Adoption to Final Rule Publication
1. Ophthalmic Goods	4½	4½	2	3½	11 days	5 days	5½
2. Vocational Schools	9	2½	4½	—	7½ [from PRC deadline]	18 days to first meeting; 6 months to final agreement	5½
3. R-Value**	4½ [to staff report]	1 [to PO report]	1	1½	12 days	8 days to first meeting; 2 months to final agreement	7
4. Funeral Practices	12	10	3	4½	25 days	23 days to first meeting	
5. Care Labeling Amendment	7½	10	3	9	33 days	7 days to first meeting	
6. Holder in Due Course Amendment	22	9	2	4 [initial] 7 [revised]	13 days	9 days [only one meeting]	
7. Used Cars	14	4½	3	5½	2	16 days to first meeting; 7 months to second meeting. 26 days to first meeting	
9. Food Advertising	14½	8	3	12	2½	14 days	
10. OTC Drugs	21	5	2				
11. Protein Supplements	20½	12	3				
12. Credit Practices	9½						
13. Health Spas	13½						
14. Mobile Homes	15						
15. OTC Antacids	7						

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* In months unless otherwise indicated.

** The R-value proceeding followed experimental procedures which included reversal of the sequence of the Presiding Officer and Staff reports.

APPENDIX K

KEY DATES IN THE CARE LABELING AMENDMENT TRR PROCEEDING

(As of June 1, 1980)

Feb. 19, 1974	Formal investigation begun
Jan. 26, 1976	Initial notice published (41 F.R. 3747)
April 26, 1976	Deadline for submission of disputed issue proposals
Aug. 25, 1976	Final notice published (41 F.R. 35863)
Oct. 15, 1976	Deadline for advance submission of planned testimony and exhibits
Nov. 8, 1976 begin Jan. 13, 1977 end	Opening and closing dates of public hearings
March 1, 1977	Deadline for written rebuttal
Aug. 25, 1977	Presiding Officer's report released (42 F.R. 42875)
June 19, 1978	Rulemaking staff's report released (43 F.R. 26334)
Sept. 18, 1978	Deadline for "post-record" comments (43 F.R. 37459)
Feb. 23, 1979	Revised staff recommendations made
June 15, 1979	Director, Bureau of Consumer Protection, submits his recommendations
July 18, 1959	Oral presentations to the Commission by interested persons (44 F.R. 40523, 44 F.R. 38570)
July 25, 1979	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

KEY DATES IN THE CELLULAR PLASTICS TRR PROCEEDING

As of June 18, 1980)

Sept. 26, 1972	Formal investigation begun
July 23, 1975	Initial notice published
Sept. 22, 1975	Deadline for submission of disputed issue proposals
[Revised notice of rulemaking soliciting comment on need for TRR, Aug. 9, 1978, 43 F.R. 35341]	Final notice published
	Deadline for advance submission of planned testimony and exhibits
	Opening and closing dates of public hearings
	Deadline for written rebuttal
	Presiding Officer's report released
	Rulemaking staff's report released
	Deadline for "post-record" comments
	Revised staff recommendations made
	Director, Bureau of Consumer Protection, submits his recommendations
	Oral presentations to the Commission by interested persons
[Commission announced tentative decision to terminate rulemaking, Jan. 16, 1980, 45 F.R. 3061, and terminated the proceeding on June 18, 1980, 45 F.R. 41156.]	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

Key Dates in the Credit Practices TRR Proceeding

(As of June 1, 1980)

Dec. 12, 1972	Formal investigation begun
April 11, 1975	Initial notice published (40 F.R. 16347)
Sept. 18, 1975	Deadline for submission of disputed issue proposals
June 24, 1977	Final notice published (42 F.R. 32259)
Aug. 22, 1977	Deadline for advance submission of planned testimony and exhibits
Sept. 12, 1977 begin Jan. 30, 1978 end	Opening and closing dates of public hearings
May 1, 1978	Deadline for written rebuttal
Oct. 13, 1978	Presiding Officer's report released (43 F.R. 47197)
	Rulemaking staff's report released
	Deadline for "post-record" comments
	Revised staff recommendations made
	Director, Bureau of Consumer Protection, submits his recommendations
	Oral presentations to the Commission by interested persons
	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

Key Dates in the Food Advertising TRR Proceeding

(As of June 1, 1980)

	Formal investigation begun
May 28, 1975	Initial notice published (40 F.R. 23086)
Sept. 18, 1975	Deadline for submission of disputed issue proposals
March 2, 1976	Final notice published (41 F.R. 8980)
June 22, 1976	Deadline for advance submission of planned testimony and exhibits
July 12, 1976 begin Jan. 12, 1977 end	Opening and closing dates of public hearings
April 15, 1977	Deadline for written rebuttal
March 22, 1978	Presiding Officer's report released (43 F.R. 11834)
Nov. 29, 1978	Rulemaking staff's report released (43 F.R. 55771)
Feb. 26, 1979	Deadline for "post-record" comments (44 F.R. 10516)
July 18, 1979	Revised staff recommendations made
Feb. 19, 1980	Director, Bureau of Consumer Protection, submits his recommendations
May 7, 1980	Oral presentations to the Commission by interested persons (45 F.R. 27453)
May 21, 1980	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

Key Dates in the Funeral Practices TRR Proceeding

(As of June 1, 1980)

July 24, 1973	Formal investigation begun
Aug. 29, 1975	Initial notice published (40 F.R. 39901)
Dec. 1, 1975	Deadline for submission of disputed issue proposals
Feb. 20, 1976	Final notice published (41 F.R. 7787)
	Deadline for advance submission of planned testimony and exhibits

April 19, 1976 begin Aug. 6, 1976 end	Opening and closing dates of public hearings
Oct. 26, 1976	Deadline for written rebuttal
Aug. 18, 1977	Presiding Officer's report released (42 F.R. 41651)
June 21, 1978	Rulemaking staff's report released (43 F.R. 26588); BCP Director's initial comments included in report.
Sept. 20, 1978	Deadline for "post-record" comments (43 F.R. 34500).
Jan. 29, 1979	Revised staff recommendations made
Feb. 2, 1979	Director, Bureau of Consumer Protection, submits his recommendations
Feb. 27-28, 1979	Oral presentations to the Commission by interested persons (44 F.R. 10993)
Mar. 23, 1979	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

Key Dates in the Health Spas TRR Proceeding

(As of June 1, 1980)

Dec. 8, 1972	Formal investigation begun
Aug. 18, 1975	Initial notice published (40 F.R. 34615)
Aug. 2, 1976	Deadline for submission of disputed issue proposals
May 24, 1977	Final notice published (42 F.R. 26432)
Aug. 22, 1977	Deadline for advance submission of planned testimony and exhibits
Sept. 15, 1977 begin March 14, 1978 end	Opening and closing dates of public hearings
April 14, 1978	Deadline for written rebuttal
May 4, 1979	Presiding Officer's report released (44 F.R. 26127)
	Rulemaking staff's report released
	Deadline for "post-record" comments
	Revised staff recommendations made
	Director, Bureau of Consumer Protection, submits his recommendations
	Oral presentations to the Commission by interested persons
	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

Key Dates in the Hearing Aids TRR Proceeding

(As of June 1, 1980)

May 14, 1974	Formal investigation begun
June 24, 1975	Initial notice published (40 F.R. 26646)
Sept. 24, 1975	Deadline for submission of disputed issue proposals
Dec. 30, 1975	Final notice published (40 F.R. 59746)
March 22, 1976	Deadline for advance submission of planned testimony and exhibits
April 12, 1976 begin Aug. 18, 1976 end	Opening and closing dates of public hearings
Oct. 22, 1976	Deadline for written rebuttal
Aug. 31, 1977	Presiding Officer's report released (42 F.R. 43867)
Nov. 20, 1978	Rulemaking staff's report released (43 F.R. 54103)
Mar. 29, 1979	Deadline for "post-record" comments (44 F.R. 15514)
June 13, 1979	Revised staff recommendations made

June 20, 1979	Director, Bureau of Consumer Protection, submits his recommendations
Sept. 27, 1979	Oral presentations to the Commission by interested persons (44 F.R. 51992)
Oct. 24, 1979	Commission meets to consider and/or take final action (first meeting)
	Final rule with statement of basis and purpose published

KEY DATES IN THE HOLDER IN DUE COURSE AMENDMENT TRR PROCEEDING

(As of June 1, 1980)

	Formal investigation begun
Nov. 18, 1975	Initial notice published (40 F.R. 53506)
Jan. 15, 1976	Deadline for submission of disputed issue proposals
Feb. 5, 1976	Final notice published (41 F.R. 5305)
March 15, 1976	Deadline for advance submission of planned testimony and exhibits
April 5, 1976 begin April 9, 1976 end	Opening and closing dates of public hearings
May 28, 1976	Deadline for written rebuttal
Feb. 16, 1978	Presiding Officer's report released (43 F.R. 6810)
Nov. 24, 1978	Rulemaking staff's report released (43 F.R. 54950)
Jan. 24, 1979 [July 16, 1979, record re-opened]	Deadline for "post-record" comments
May 25, 1979 [Aug. 31, 1979]	Revised staff recommendations made
May 25, 1979 [Aug. 30, 1979]	Director, Bureau of Consumer Protection, submits his recommendations
Sept. 12, 1979	Oral presentations to the Commission by interested persons (44 F.R. 48708)
Sept. 21, 1979	Commission meets to consider and/or take final action
[Commission published a tentatively-adopted TRR for technical comment, Nov. 15, 1979, 44 F.R. 65771.]	Final rule with statement of basis and purpose published

KEY DATES IN THE MOBILE HOMES TRR PROCEEDING

(As of June 1, 1980)

Sept. 19, 1972	Formal investigation begun
May 29, 1975	Initial notice published (40 F.R. 23334)
Sept. 18, 1975	Deadline for submission of disputed issue proposals
May 23, 1977	Final notice published (42 F.R. 26398)
Sept. 19, 1977	Deadline for advance submission of planned testimony and exhibits
Oct. 11, 1977 begin June 9, 1978 end	Opening and closing dates of public hearings
July 5, 1978	Deadline for written rebuttal
Sept. 14, 1979	Presiding Officer's report released (44 F.R. 53538)
	Rulemaking staff's report released
	Deadline for "post-record" comments

	Revised staff recommendations made
	Director, Bureau of Consumer Protection, submits his recommendations
	Oral presentations to the Commission by interested persons
	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

Key Dates in the Ophthalmic Goods TRR Proceeding

(As of June 1, 1980)

Sept. 16, 1975	Formal investigation begun
Jan. 16, 1976	Initial notice published (41 F.R. 2399)
Mar. 17, 1976	Deadline for submission of disputed issue proposals
April 2, 1976	Final notice published (40 F.R. 14194)
May 26, 1976	Deadline for advance submission of planned testimony and exhibits
June 7, 1976 begin Sept. 9, 1976 end	Opening and closing dates of public hearings
Nov. 15, 1976	Deadline for written rebuttal
Jan. 27, 1977	Presiding Officer's report released (42 F.R. 5075)
June 10, 1977	Rulemaking staff's report released (42 F.R. 29917)
Aug. 12, 1977	Deadline for "post-record" comments
	Revised staff recommendations made
Nov. 25, 1977	Director, Bureau of Consumer Protection, submits his recommendations
Dec. 17, 1977	Oral presentations to the Commission by interested persons
Dec. 12, 1977	Commission meets to consider and/or take final action
June 2, 1978	Final rule with statement of basis and purpose published (43 F.R. 23992)
February 6, 1980	Trade regulation rule vacated and remanded, in part, by reviewing court.

Key Dates in the OTC Antacids TRR Proceeding

(As of June 1, 1980)

	Formal investigation begun
April 6, 1976	Initial notice published (41 F.R. 14534)
July 12, 1976	Deadline for submission of disputed issue proposals
Aug. 31, 1978	Final notice published (43 F.R. 38851)
Nov. 10, 1978	Deadline for advance submission of planned testimony and exhibits
Dec. 4, 1978 begin April 19, 1979 end	Opening and closing dates of public hearings
	Deadline for written rebuttal
Nov. 14, 1979	Presiding Officer's report released (44 F.R. 65599)
	Rulemaking staff's report released
	Deadline for "post-record" comments
	Revised staff recommendations made
	Director, Bureau of Consumer Protection, submits his recommendations
	Oral presentations to the Commission by interested persons
	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

Key Dates in the OTC Drugs TRR Proceeding

(As of June 1, 1980)

Oct. 28, 1975	Formal investigation begun
Nov. 11, 1976	Initial notice published (40 F.R. 52631)
Mar. 12, 1976	Deadline for submission of disputed issue proposals
Sept. 16, 1976	Final notice published (41 F.R. 39768)
Feb. 3, 1977	Deadline for advance submission of planned testimony and exhibits
Feb. 28, 1977 begin Apr. 1, 1977 end	Opening and closing dates of public hearings
June 17, 1977	Deadline for written rebuttal
Jan. 4, 1979	Presiding Officer's report released (44 F.R. 1123)
May 31, 1979	Rulemaking staff's report released (44 F.R. 31241)
July 30, 1979	Deadline for "post-record" comments
	Revised staff recommendations made
	Director, Bureau of Consumer Protection, submits his recommendations
	Oral presentations to the Commission by interested persons
	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

Key Dates in the Prescription Drugs TRR Proceeding

May 28, 1974	Formal investigation begun
June 4, 1975	Initial notice published (40 F.R. 26646)
Sept. 18, 1975	Deadline for submission of disputed issue proposals
Sept. 30, 1975	Final notice published (40 F.R. 44850)
Nov. 21, 1975	Deadline for advance submission of planned testimony and exhibits
Dec. 1, 1975 begin Jan. 14, 1976 end	Opening and closing dates of public hearings
Nov. 21, 1975	Deadline for written rebuttal
[Proposed TRR withdrawn by Commission, Nov. 24, 1978, 43 F.R. 54951]	Presiding Officer's report released
	Rulemaking staff's report released
	Deadline for "post-record" comments
	Revised staff recommendations made
	Director, Bureau of Consumer Protection, submits his recommendations
	Oral presentations to the Commission by interested persons
	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

Key Dates in the Protein Supplements TRR Proceeding

(As of June 1, 1980)

Aug. 6, 1974	Formal investigation begun
Sept. 5, 1975	Initial notice published (40 F.R. 41144)
Nov. 7, 1975	Deadline for submission of disputed issue proposals
March 10, 1976	Final notice published (41 F.R. 10233)

April 30, 1976	Deadline for advance submission of planned testimony and exhibits
May 10, 1976 begin Nov. 10, 1976 end	Opening and closing dates of public hearings
Jan. 31, 1977	Deadline for written rebuttal
July 31, 1978	Presiding Officer's report released (43 F.R. 33258)
July 25, 1979	Rulemaking staff's report released (44 F.R. 43489)
Oct. 24, 1979	Deadline for "post-record" comments (44 F.R. 54730)
	Revised staff recommendations made
	Director, Bureau of Consumer Protection, submits his recommendations
	Oral presentations to the Commission by interested persons
	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

KEY DATES IN THE R-VALUE TRR PROCEEDING

(As of June 1, 1980)

Aug. 3, 1977	Formal investigation begun
Nov. 18, 1977	Initial notice published (42 F.R. 59678)
N/A	Deadline for submission of disputed issue proposals
same as initial	Final notice published
Jan. 23, 1978	Deadline for advance submission of planned testimony and exhibits
Feb. 13, 1978 begin Mar. 9, 1978 end	Opening and closing dates of public hearings
Aug. 22, 1978	Deadline for written rebuttal
April 17, 1978	Presiding Officer's report released (43 F.R. 37203)
July 25, 1978	Rulemaking staff's report released (43 F.R. 32142)
Sept. 22, 1978	Deadline for "post-record" comments (43 F.R. 37203)
Nov. 3, 1978	Revised staff recommendations made
Nov. 9, 1978	Director, Bureau of Consumer Protection, submits his recommendations
Nov. 21, 1978	Oral presentations to the Commission by interested persons (43 F.R. 51038)
Nov. 29, 1978 Jan. 24, 1979	Commission meets to consider and/or take final action
Aug. 27, 1979	Final rule with statement of basis and purpose published (44 F.R. 50218)
Jan. 4, 1980	Partial remand of rule by reviewing court, following agreement of parties to further agency proceedings.

KEY DATES IN THE USED CARS TRR PROCEEDING

(As of June 1, 1980)

March 28, 1975	Formal investigation begun
Jan. 6, 1976	Initial notice published (41 F.R. 1089)
July 23, 1976	Deadline for submission of disputed issue proposals
Sept. 15, 1976	Final notice published (41 F.R. 39337)
Nov. 15, 1976	Deadline for advance submission of planned testimony and exhibits
Dec. 6, 1976 begin May 4, 1977 end	Opening and closing dates of public hearings

Aug. 31, 1977	Deadline for written rebuttal
June 30, 1978	Presiding Officer's report released (43 F.R. 28521)
Nov. 14, 1978	Rulemaking staff's report released (43 F.R. 52729)
Feb. 13, 1979	Deadline for "post-record" comments (44 F.R. 914)
July 26, 1979	Revised staff recommendations made
July 26, 1979	Director, Bureau of Consumer Protection, submits his recommendations
Sept. 25, 1979	Oral presentations to the Commission by interested persons (44 F.R. 48708)
Oct. 11, 1979 May 14, 1980	Commission meets to consider and/or take final action
	Final rule with statement of basis and purpose published

KEY DATES IN THE VOCATIONAL SCHOOLS TRR PROCEEDING

(As of June 1, 1980)

Dec. 5, 1973	Formal investigation begun
May 15, 1975	Initial notice published (40 F.R. 21048)
Sept. 18, 1975	Deadline for submission of disputed issue proposals
Sept. 29, 1975	Final notice published (40 F.R. 44582)
Nov. 21, 1975	Deadline for advance submission of planned testimony and exhibits
Dec. 1, 1975 begin Jan. 29, 1976 end	Opening and closing dates of public hearings
Feb. 28, 1976	Deadline for written rebuttal
Oct. 28, 1976	Presiding Officer's report released (41 F.R. 47267)
Jan. 7, 1977	Rulemaking staff's report released (42 F.R. 1483)
May 31, 1977	Deadline for "post-record" comments (42 F.R. 20303)
	Revised staff recommendations made
undated	Director, Bureau of Consumer Protection, submits his recommendations
Jan. 12, 1978	Oral presentations to the Commission by interested persons (42 F.R. 62496)
Jan. 31, 1978 July 12, 1978	Commission meets to consider and/or take final action
Dec. 28, 1978	Final rule with statement of basis and purpose published (43 F.R. 60796)
Dec. 12, 1979	Final rule remanded in part by reviewing court.

REPORT IN SUPPORT OF RECOMMENDATION 80-1

COMPENSATING PUBLIC PARTICIPANTS IN ADMINISTRATIVE RULEMAKING: THE FEDERAL TRADE COMMISSION EXPERIENCE (PART TWO)*

by Barry B. Boyer

EFFECTS OF THE COMPENSATION PROGRAM

Forming judgments about the general effectiveness or desirability of the Magnuson-Moss compensation program is a difficult task for two reasons. First, as noted, above,[1] the statute and its legislative history do not provide a clear statement of the goals that the program is supposed to achieve, and as a result there is no benchmark for measuring whether the compensation program has accomplished what its draftsmen intended. To fill this gap, this study attempts to evaluate Magnuson-Moss compensation in light of the principal arguments made by supporters and opponents of public participation funding. The second basic problem in evaluation is more intractable. There is a lack of generally accepted measurement techniques for assessing how well this program—or any comparable public funding mechanism—is performing in each possible area of evaluation. In some instances, including the discussion of "Balanced Advocacy" in the following section, relatively objective statistical data area available, but they are ambiguous and subject to conflicting interpretations. In other areas, such as the discussion of the impact of compensated participants on FTC decisions, it has not been possible to generate objective measures, and the evaluation is necessarily descriptive and judgmental. The subjective issues are probably the most important ones in evaluating this program;

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*This document contains the concluding section of a Report for the Administrative Conference of the United States on the public participation funding program established in section 202(h) of the Magnuson-Moss Act, 15 U.S.C. 57a(h)(1976). The first part of this compensation report, which dealt with the FTC's implementation of the program, was issued by the Administrative Conference under the title "Expense—Reimbursing Public Participants in Administrative Rulemaking: The Federal Trade Commission Experience" (1979). The recommendations of the Administrative Conference relating to implementation of the program are published at 45 Fed. Reg. 2,307 (1980).

[1] *See generally* "Compensating Public Participants in Administrative Rulemaking: The Federal Trade Commission Experience (Part One)", Chapters II and III, 1979 ACUS — (1981).

quantitative data tell only a small part of the story, and it seems unlikely that more extensive data would provide a completely satisfactory answer to the question of whether direct funding provisions are valuable or useful. Still, the quantitative measures do provide some useful insights into the functioning of the FTC's program.

A. Balanced Advocacy

One of the most frequent justifications for providing financial support to public participants is the need to have more balanced advocacy of conflicting positions before the agencies. As the Senate Committee on Governmental Affairs noted in its regulatory reform studies, agencies often hear only the regulated industry's side of a controversy; they rarely receive much information from consumers or other public constituencies:

> The political dynamics of the situation suggests that there is an inherent tendency toward agency identification with regulated industries. Agencies must often depend on outside sources of information and political support. This outside input largely comes from regulated firms with a great stake in regulatory decisions. By contrast, the personal stake of individual citizens in these decisions is usually too small to warrant intervention—or even attention. . . . .
>
> Thus, we do not need to subscribe to the theory of regulatory "capture" in order to explain this tendency toward industry domination. Rather, the reason appears to be simply in the fact that regulatory agencies respond to the inputs they receive—in the same fashion as any other decisionmaking body. And, until the recent past, the source of almost all input to the agencies was the regulated industries.[2]

Data gathered during the course of this study provide some basis for assessing the extent to which this imbalance of resources and advocacy exists in

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[2] Senate Committee on Governmental Affairs, Study on Federal Regulation Vol. III: Public Participation in Regulatory Agency Proceedings 1-2 (S. Doc. No. 95-71, 95th Cong., 1st Sess. 1977). One of the examples cited by the Report involved the Federal Trade Commission:

> There is substantial evidence that this imbalance of representation does, in fact, exist to the detriment of the regulatory process. Robert Pitofsky, former director of the Federal Trade Commission's Bureau of Consumer Protection has stated that, "In vast areas of Commission regulatory activities, no consumer input was ever felt by any Commissioner or staff member to my knowledge."
>
> For example, on flammable fabrics standards, Pitofsky stated that industry representatives were constantly urging the Commission to modify standards and increase exemptions from standards, but there was no input from consumer representatives. That this is a problem found not only in Federal agencies, but generic to regulatory agencies in general, is suggested by former Pennsylvania Insurance Commissioner Herbert Denenberg who stated, after his first 2 years as commissioner, that he had never encountered an insurance expert representing consumer groups. He contrasted this situation to the daily presence of "dozens of insurance lobbyists" that present the views of the insurance industry.

Id. at 2.

FTC trade regulation rulemaking, and the effect of the compensation program in reducing or eliminating it.

The data concern primarily the seven "core" proceedings which reached the hearing stage in 1976.[3] These proceedings are fairly representative of TRR's in terms of subject matter and kinds of industries and consumers affected. They are, however, relatively early Magnuson-Moss rules, and therefore do not reflect later developments such as agency experimentation with modified rulemaking procedures, FTC "outreach" activities, or the general increase in knowledge and sophistication that took place in later years as participants and agency personnel became more familiar with the complex requirements of the Magnuson-Moss Act. For purposes of analysis, a distinction will be made between the presentation of information—primarily in the form of witness testimony—and advocacy of views, primarily through representation by legal counsel acting as a group representative. As Appendix A indicates, presenting testimony and serving as groups representatives were the two most important compensated activities, both in terms of frequency and in dollars expended. While the two activities are separated in the following discussion, it is worth noting that often the same group was funded to perform both activities in a given proceeding.[4]

1. WITNESS TESTIMONY

A high proportion of all funded participants sought and received compensation to present witness testimony. Only 9 out of 68 successful applicants did not receive reimbursement for witnesses.[5] Still, the consumer "presence" at the hearings, as reflected by the number of individual consumers and consumer groups spokesman who testified, was relatively small. As the following table indicates, these witnesses comprised less than 20 percent of all who testified in the core proceedings:

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[3] The proceedings are: Food Advertising, Care Labeling Amendment, Holder In Due Course Amendment, Protein Supplements, Ophthalmic Goods, Funeral Practices, and Hearing Aids.

[4] *See generally* Appendix A, 1979 ACUS — (1981).

[5] Data taken from Appendix A. The following successful applicants were not funded to present testimony:

1. National Consumer Law Center, Vocational Schools proceeding.
2. Joel Platt, Vocational Schools proceeding.
3. National Hearing Aid Society, Hearing Aids proceeding.
4. Consumers Union, Funeral Practices proceeding.
5. Cremation Association of North America, Funeral Practices proceeding.
6. Pre-Arrangement Interment Association of America, Funeral Practices proceeding.
7. Americans for Democratic Action, Ophthalmic Goods proceeding.
8. Consumers Union, Food Advertising proceeding.
9. San Francisco Consumer Action, Used Cars proceeding.

Several of these applicants—Numbers 1, 3, 5, and 6—did not obtain a grant of compensation until after the hearing stage, when it would have been too late to present testimony.

TABLE A

KINDS OF WITNESSESS TESTIFYING IN CORE PROCEEDINGS

Witness Constituency Category	Number	Percent Total
Individual Consumer	107	11
Consumer Group Spokesperson	67	7
Retailer or Fee-for-Service Professional	238	24
Manufacturer or Wholesaler	43	4
Trade or Professional Association	74	7
Government-Special Jurisdication Agency	101	10
Government-General Jurisdiction Agency	18	2
Government-Elected Official	32	3
Expert	228	23
Other/Unknown	92	9
	1,000	100

This is admittedly a very crude measure of participation, since it reflects only direct testimony by consumers and consumer group spokesmen—whether or not they were funded—and it does not pick up other categories of witnesses such as experts who may have been recruited or mobilized by the compensated consumer groups. Some information on this latter point is available from the survey questionnaire administered to witnesses in the core proceedings. The responses indicate that more than 40 percent expected to receive no compensation at all for their out-of-pocket expenses. The most frequently cited sources of compensation were trade associations (22%), employers (16%) and the FTC (14%). Only about six percent of the respondents expected to receive compensation from a consumer group.[6]

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[6] The complete breakdown of questionnaire responses is as follows:

FREQUENCIES OF SOURCES OF COMPENSATION

(Survey Respondents in 7 "core" proceedings)

No Compensation	272	(41%)
Compensated by FTC	95	(14%)
Compensated by Consumer Group	37	(6%)
Compensated by Trade Association	142	(22%)
Compensated by Employer	102	(16%)
Compensated by Consumer Group and Employer	1	(0%)
Compensated by Trade Association and Employer	7	(1%)
	656	(100%)

It should be noted that these responses may reflect some under-reporting in the "compensated by consumer group" category and corresponding over-reporting in the "compensated by FTC" category, if respondents traced the funding back through the consumer group to its

Interpreting these general figures, however, requires some exploration of the level and distribution of costs associated with testifying in a TRR proceeding. Moreover, because the notion of "balance" can imply equalization of the substantive views held by witnesses, it may be necessary to examine the distribution of witness attitudes toward the rule and the relationship between attitude and source of compensation.

Since the compensation statute is based on the assumption that expense is a significant obstacle to public participation, the study attempted to find out how much it costs to participate in a trade regulation rulemaking proceeding. The witness questionnaire asked respondents to report their total out-of-pocket expenses for testifying in the proceeding, and then to estimate how much of the total would be compensated. The breakdown of reported costs was a follows:

TABLE B

TOTAL OUT-OF-POCKET EXPENSES REPORTED BY WITNESSES IN CORE PROCEEDINGS

Amount	Number Reporting	Percent Reporting
No expenses	41	7.0
$1–$50	116	19.9
$51–$125	107	18.4
$126–$250	116	19.9
$251–$500	112	19.2
Over $500	91	15.6
	583	100.00
Other or no response	94	

For those who did report some expenses, the median cost figure was $175. As Table C indicates, the distribution costs was fairly uniform among the primary interest groups—industry members, trade associations, consumer groups and expert witnesses—while government officials and individual consumers reported substantially lower costs of testifying.

The absolute levels of expenditure, however, are less significant than the distributions of uncompensated expenses: it is the prospect of non-reimbursable costs that is likely to deter potential witnesses from testifying.

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ultimate source in the FTC. The questionnaire was open-ended on this point: witnesses were asked, "Will you be compensated or reimbursed for any of these expenses? If yes, by whom? (blank)." Responses were coded according to the categories noted above and, where feasible, checked against witness lists obtained from the FTC and compensated consumer groups. Needless to say, compilation of statistics of this kind would be much easier and cheaper if the FTC and other agencies administering compensation programs required compensated participants to supply information about the witnesses they sponsored on a standard form.

TABLE C

PERCENTAGE OF EACH TYPE OF WITNESS REPORTING SPECIFIED AMOUNT OF OUT-OF-POCKET EXPENSES

	Expenses					
Type of Witness*	None	\$1-\$50	\$51-\$125	\$126-\$250	\$251-\$500	Over \$500
Individual Consumer (n = 65)	7.7	38.5	18.5	16.9	13.8	4.6
Consumer Group Spokesperson (n = 32)	6.3	34.4	15.6	15.6	9.4	18.8
Industry-Retail (n = 87)	4.6	4.6	13.8	27.6	28.7	20.7
Professional Fee-for-Service (n = 68)	7.4	17.6	17.6	14.7	26.5	16.2
Trade or Professional Association (n = 36)	5.6	11.1	19.4	19.4	16.7	27.8
Industry-Manufacturer or Wholesaler (n = 26)	7.7	7.7	19.2	11.5	23.1	30.8
Government-Consumer Protection (n = 20)	10.0	20.0	40.0	15.0	10.0	5.0
Government-Occupational Licensing (n = 35)	8.6	5.7	20.0	25.7	34.3	5.7
Government-Executive, Legislative, Atty-Gen. (n = 30)	16.7	40.0	26.7	10.0	6.7	0
Expert-University (n = 100)	3.0	18.0	20.0	26.0	16.0	17.0
Expert-Nonuniversity (n = 47)	4.3	23.4	8.5	14.9	25.5	23.4
Other (n = 37)	16.2	29.7	18.9	21.6	2.7	10.8

* Number of missing observations: 94.

Table D provides a summary of these anticipated costs for some of the primary interest groups of witnesses.

On the whole, the industry members and representatives reported higher levels of uncompensated expenses[7]—a result which may reflect both

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[7] The pattern is similar when uncompensated expenses are broken-down by the source of funding:

PERCENTAGE OF WITNESSES FUNDED BY EACH SOURCE REPORTING SPECIFIED AMOUNTS OF UNCOMPENSATED EXPENSES

	Uncompensated Expenses					
Source of Compensation	None	\$1 to \$100	\$101 to \$500	Over \$500	"Profit"	No Data
None, No Data	14.6	31.7	24.9	3.2	0	25.6
FTC	31.6	19.4	12.2	5.1	4.1	27.6
Consumer Group	36.8	21.1	15.8	2.6	2.6	21.1
Trade, professional Assn.	44.1	7.2	25.7	9.9	1.3	11.8
Employer	53.8	15.1	6.6	2.8	1.9	19.8

TABLE D

PERCENTAGE OF EACH TYPE OF WITNESS REPORTING SPECIFIED AMOUNTS OF UNCOMPENSATED EXPENSES

	Uncompensated Expenses						
Type of Witness	None	$1–$50	$51–$125	$126–$250	$251–$500	Over $500	"Profit"
Consumer Group Spokesperson (n = 29)	48.3	41.4	3.4	3.4	0	3.4	0
Industry-Retail (n = 79)	30.4	8.9	8.9	24.1	17.7	10.1	0
Industry-Mfgr., Wholesaler (n = 23)	65.2	0	8.7	4.3	4.3	8.7	8.7
Professional Fee-for-Service (n = 66)	19.7	19.7	13.6	15.2	19.7	10.6	1.5
Trade or Professional Association (n = 30)	76.7	0	6.7	3.3	3.3	10.1	0
Expert-University (n = 90)	36.7	25.6	11.1	14.4	7.8	2.2	2.2
Expert-Nonuniversity (n = 44)	38.6	22.7	13.6	6.8	4.5	9.1	4.5

their higher costs of testifying (since they can rely on fewer volunteered or below-market-cost services), and their greater willingness and ability to bear the higher expenses (since the rule may threaten their economic interests more directly, and they may be able to treat the costs as a business expense.) Consumer group funding—which largely reflects reimbursement under the Magnuson-Moss compensation program—supported the testimony of some consumer group spokesmen, and a few experts and individual consumers, as Table E demonstrates.

Considering only the types of witnesses who appeared and not the nature or quality of their participation, it appears that the compensation program had a relatively minor effect on the mix of witnesses testifying in TRR hearings. This impression is reinforced by aggregate statistics comparing the kinds of witnesses who testified in TRR proceedings conducted before passage of the Magnuson-Moss Act, with those who testified after. As Table F indicates,[8] the proportion of consumer and consumer group witnesses remained relatively constant, while experts and government officials appeared more frequently in the post-amendment proceedings, and industry members represented a declining fraction of witnesses.

These aggregate differences may be misleading, however. They ignore changes in the proportion of witness types resulting from the different

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[8] Data on witness characteristics in pre-Magnuson-Moss proceedings were taken from the cover sheets of FTC hearing transcripts, and therefore may be somewhat less accurate than data on post-amendment witnesses, which was based upon questionnaire responses, hearing observations, telephone follow-ups, and transcript reviews.

TABLE E

SOURCE OF COMPENSATION REPORTED BY DIFFERENT CATEGORIES OF WITNESSES

	Source of Compensation Consumer Group		FTC		Trade, Professional Assn.		Employer		None or No Data	
Type of Witness	N	%	N	%	N	%	N	%	N	%
Individual Consumer	5	6.8	11	15.1	10	13.7	1	1.4	45	61.6
Consumer Group Spokesperson	14	34.1	14*	34.1	0	0	0	0	13	31.7
Industry-Retail	0	0	4**	4.1	28	29.2	18	18.8	43	44.8
Professional Fee-for-Service	1	1.2	1	1.2	28	35.0	8	10.0	41	51.3
Trade of Professional Assn.	0	0	0	0	28	62.2	3	6.7	14	31.1
Mfgr. or Wholesaler	1	3.7	0	0	9	33.3	12	44.4	3	11.1
Govt.-Consumer Protection	2	7.4	1	3.7	1	3.7	11	40.7	12	44.4
Govt. Occupational Licensing	0	0	2	5.4	6	16.2	14	37.8	15	40.5
Govt.-Executive, Legislative, Atty. Gen.	0	0	10**	25.8	2	4.8	8	19.0	22	52.4
Expert-University	9	8.1	37+	33.3	15	13.5	15	13.5	33	29.7
Expert-Nonuniversity	0	0	17	30.9	9	16.4	8	14.5	20	36.4
Other	5	11.6	13++	6.9	7	16.3	8	18.6	20	46.5

* Includes four respondents compensated by FTC and trade association.

** Includes one respondent compensated by FTC and employer.

+ Includes one respondent compensated by FTC and trade association, and one compensated by FTC and employer.

+ + Includes two respondents partly compensated by FTC.

TABLE F

COMPARISON OF MIX OF WITNESS TESTIFYING BEFORE AND AFTER PASSAGE OF THE MAGNUSON-MOSS ACT

	Individual Consumers and Consumer Group Spokesmen		Industry (Retail, Fee-for-Service Trade or Prof. Association)		Govt. Officials		Experts		Others, DP	
	N	%	N	%	N	%	N	%	N	%
All TRR Hearings Before Magnuson-Moss*	112	15.8%	368	52.0%	105	14.8%	862	12.2%	37	5.2%
First Nine Hearings After Magnuson-Moss	226	17.8%	465	36.5%	253	19.9%	251	19.7%	78	6.1%

* Excluding Vocational Schools, in which part of the hearing was held before passage of the Magnuson-Moss Act, and part thereafter.

subject-matter or theories of the particular TRR's. For example, the higher proportion of expert witnesses appearing in the post-amendment hearings is almost entirely attributable to two proceedings, Food Advertising and Protein Supplements, where more than 60 percent of the witnesses were experts; none of the other post-amendment hearings had more than 21 percent expert witnesses. These two rules raised highly technical issues of nutrition, disease, and human metabolism, and it was only natural that experts in the biomedical sciences would be best equipped to speak to those questions. It is also possible that external factors—the press coverage a proposed rule received, or the mobilizing activities of intermediaries like the FTC staff or trade associations—were more significant influences on the witnesses than the compensation program. In any event, both before and after the passage of the Magnuson-Moss Act, there were wide variances in the mix of witnesses from one proceeding to the next,[9] and no clear pattern that would suggest a substantial change as a result of the compensation program.

Statistics concerning the proportions of different types of witnesses who testified provide only a very rough indication of "balance" in the proceedings. It may also be useful to consider the points of view articulated by the witnesses—their substantive attitudes toward the proposed rule. For the seven core proceedings, the witnesses' general attitudes toward the proposed TRR's were recorded from the witness questionnaire[10] or, when there

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[9] One way to illustrate this variance is to compare the high and low percentages of different witness types in the Magnuson-Moss hearings with the comparable percentages in the larger, more recent pre-amendment hearings:

	Witness Type			
	Consumer	Industry	Government	Expert
Pre-Amendment:				
Low %	0 (Franchising)	17.9 (Holder Base Rule)	2.0 (Care Label)	6.1 (Door-to-Door)
High %	41.1 (Holder Base Rule)	78.1 (Franchising)	31.8 (Door-to-Door)	32.0 (Detergents)
Post-Amendment:				
Low %	2.9 (Holder Amend.)	5.9 (Protein Supp.)	5.8 (Food Advert.)	3.4 (Used Cars)
High %	24.6 (Hearing Aids)	57.1 (Holder (Amend.)	36.2 (Used Cars)	64.7 (Protein Supp.)

[10] The detailed breakdown of questionnaire responses is as follows. For present purposes, the first two responses—that the rule would solve or improve the relevant consumer problems—were treated as pro-rule responses, while witness beliefs that the rule would have little effect or do more harm than good were treated as anti-rule attitudes.

Attitude	Number of Respondents	Percentage Respondents
Rule will solve problems	47	6.9
Rule will improve situation, but not solve problems completely	340	50.2

(Continued)

was no response, from observers' reports and transcript reviews. As Table G indicates, the pro-rule witnesses slightly predominated: in the aggregate, 56.5 percent of the witnesses favored the proposed rule, while 43.5 percent opposed it or thought it would have little effect.

The table also indicates that this pattern was fairly constant across proceedings. Anti-rule witnesses predominated in only two of the TRR hearings, Funeral Practices and Holder-In-Due-Course Amendment, and in these hearings anti-rule witnesses comprised less than 60 percent of the total.

How did the compensation program affect the balance of rule-supporters and rule-opponents in these core proceedings? The only groups which were compensated to produce witnesses in these early hearings were consumer groups, and it might be expected that they would mobilize witnesses who supported the rule. Table H indicates that this is in fact what happened.

It may not be surprising that the consumer groups were recruiting and compensating almost exclusively pro-rule witnesses; but, as Table H indicates, the FTC staff in these proceedings was doing virtually the same thing, on a larger scale. More than 90 percent of the witnesses who reported that they were funded in whole or in part by the FTC supported the proposed rule, and the FTC compensated more than twice the number of witnesses that the consumer groups did. The tendency is even more pronounced when the focus is narrowed to experts, who were probably the most important class of witnesses to testify in the proceedings studies. Table I shows that the FTC staff was the most active recruiter of expert witnesses, and that almost three-quarters of all experts who responded to the witness survey[11] favored the proposed rule.

Thus, if the compensation program was designed to achieve a balance of pro-rule and anti-rule witnesses, it seems to have had little effect. However, the dubiousness of this assumption and the limitations of the data must be remembered. For one thing, the figures do not necessarily indicate that the FTC was making biased compensation decisions by systematically choosing rule-supporters over rule-opponents. Very few applications were

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(Continued)

Attitude	Number of Respondents	Percentage Respondents
Rule will have little or no effect	42	6.2
Rule will do more harm than good	227	33.5
Other/no response	21	3.1
Total	677	99.9

[11] A total of 234 experts testified in the core proceedings. As Table I indicates, 158 responded to the survey—a response rate of 67.5 percent. The response rate among all witnesses was 67.7 percent.

TABLE G

WITNESS ATTITUDES TOWARDS RULE*

	Individual Consumer of Consumer Group				Industry				Government				Expert				Other				Total			
	PRO		CON		PRO		CON		PRO		CON		PRO		CON		PRO		CON		PRO		CON	
Rule	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
Protein Supplements	5	55.6	4	44.4	1	33.3	2	66.7	4	100.0	0	0.0	20	64.5	11	35.5	0	0.0	1	100.0	30	62.5	18	37.5
Food Advertising	10	71.4	4	28.6	7	26.9	19	73.1	6	75.0	2	25.0	53	69.7	23	30.3	1	25.0	3	75.0	77	60.2	51	39.8
Care Labeling	5	100.0	0	0.0	16	48.5	17	51.5	8	100.0	0	0.0	11	91.7	1	8.3	1	100.0	0	0.0	41	69.5	18	30.5
Holder in Due Course	0	0.0	0	0.0	0	0.0	17	100.0	8	88.9	1	11.1	5	100.0	0	0.0	0	0.0	0	0.0	13	41.9	18	58.1
Eyeglasses	25	96.2	1	3.8	32	36.4	56	63.6	23	69.7	10	30.3	17	63.0	10	37.0	7	87.5	1	12.5	104	57.1	78	42.9
Hearing Aids	32	82.1	7	18.0	47	50.0	47	50.0	19	79.2	5	20.8	19	76.0	6	24.0	5	83.3	1	16.7	122	64.9	66	35.1
Funeral Practices	53	80.3	13	20.0	14	16.7	70	83.3	24	36.9	41	63.1	29	70.7	12	29.3	23	52.3	21	47.7	143	47.7	157	52.3
Total	128	81.5	29	18.5	115	34.0	223	66.0	91	60.7	59	39.3	146	70.9	60	29.1	37	57.8	27	42.2	517	56.5	398	43.5

* Percentages exclude don't know and other responses (5/14/78).

TABLE H

RELATIONSHIP BETWEEN SOURCE OF COMPENSATION AND WITNESS ATTITUDE TOWARD RULE

	Source of Compensation												
Witness Attitude	Consumer Group		FTC		Trade, Prof. Assn.		Employer		Other, Misc.		None or No Response		Total
Toward Rule	N	%	N	%	N	%	N	%	N	%	N	%	N
Generally Favor	36	(97.3)	80	(94.1)	33	(23.2)	46	(45.1)	12	(66.7)	180	(66.2)	387
Generally Oppose	1	(2.7)	5	(5.9)	109	(76.8)	56	(54.9)	6	(33.3)	92	(33.8)	269
Total	37	(100)	85	(100)	142	(100)	102	(100)	18	(100)	272	(100)	656

TABLE I

COMPENSATION OF EXPERTS IN RELATION TO ATTITUDE TOWARD RULE

	Favor Rule		Oppose Rule		
Experts Compensated By	N	%	N	%	Total Number
FTC	45	93.8	3	6.3	48
Consumer Group	9	100	0	0	9
Trade Professional Assoc.	7	30.4	16	96.6	23
Employer	10	47.6	11	52.4	21
FTC and Trade Assoc.	1	100	0	0	1
FTC and Employer	1	50.0	1	50.0	2
Trade Assoc. and Employer	1	50.0	1	50.0	2
No Compensation or No Data Available	41	77.4	12	22.6	53
Total	115	72.8	43	27.2	158

submitted by organizations which were fighting to kill or weaken a proposed rule, especially in the early days of the FTC compensation program, and a substantial proportion of the applications contained little or no information about the applicant's attitude toward the rule.[12] Another limitation is the fact that the broad terms "support" and "opposition" can encompass a variety of positions regarding a proposed rule. Many participants had different attitudes toward different sections of a complex TRR; some were intensely committed in their attitudes, while others were relatively indifferent; and a substantial number of witnesses offered suggestions for modifying a proposed rule. In some sense, each witness brings a unique point of view to bear upon the issues, and it is probably valuable for decision-makers to experience these differences first-hand. Moreover, the fact that a witness favors or dislikes a proposed rule tells little about the content or quality of his testimony, and there is no question that some witnesses' contributions are more valuable or influential than others. This latter point will be discussed separately in the section below dealing with the impact of the compensated participants.

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[12] In an effort to determine whether there was a systematic relationship between the applicant's stated attitude toward the rule and its success in obtaining compensation, a sample of 60 compensation applications which had been filed prior to March of 1977 was reviewed. The results were generally inconclusive, and it was felt that the categorizations used were too indeterminate and judgemental to make further statistical efforts of this type worthwhile. For those who may be interested, the results of the pilot study were as follows:

> Eighteen applications expressed general support for the rule. Of these, 11 were granted, 6 were denied, and 1 was withdrawn.
>
> Eight expressed qualified support for the rule (*e.g.*, it does not go far enough, or can be improved). Of these, 7 were granted.
>
> Four indicated opposition to the rule. Of these, 3 were granted. One of the grants was to the National Hearing Aid Society, which was unable to comply with a condition on the grant and did not use the money. (NHAS applied again later and received compensation.)
>
> Twelve requested funds for survey research or other studies that would enable them to formulate a position on the rule. Of these, 9 were granted, 2 were denied, 1 was pending, and 1 was withdrawn.
>
> Eighteen did not state a position on the proposed rule. Of these, 8 were granted.

Another difficulty with these sorts of figures is the fact that the compensation application is not the sole source of information available to agency decision-makers. A variety of formal and informal communications with staff, Presiding Officers and applicants could well give the decision-makers a good idea of the applicant's position, even if the application did not contain detailed information.

2. ADVOCACY AND LEGAL REPRESENTATION

A second sense in which TRR proceedings might be considered to have a systemic imbalance is in the advocacy of legal and policy positions. Under the complex legal procedures of the Magnuson-Moss Act, effective advocacy usually requires representation by counsel. As previously noted, reimbursement of attorneys' fees was a significant feature of the FTC's compensation program from the outset. Table J indicates that attorneys' fee awards ranged from 12 percent of all compensation funds granted in the Protein Supplements proceeding to a high of 81 percent of the total compensation allowed in the Hearing Aids rulemaking. Overall, nearly forty percent of the compensation funds awarded during the period covered by this study went for attorneys' fees.[13] There is no clear trend or pattern to these figures, either in terms of the chronological sequence in which the rules were issued, or in relation to the stage of the rulemaking process that different TRR's had reached when data collection ended.[14]

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[13] More detailed breakdowns of attorneys' fees in relation to other costs are set forth in Appendices G and H.

[14] Table J is arranged in chronological sequence of times when the rules reached the hearing stage. Appendix G breaks down the rules according to the stage of proceedings they had reached by February of 1979. The summary totals are as follows:

	Percent of Authorizations for Attorneys' Fees	Percent of Authorizations for Attorneys' Fees and Attorney-Related Costs
Rules which were at the hearing stage	22.0	28.0
Rules which were at the post-hearing report-writing stage	37.8	46.0
Rules which were at the post-record comment stage	42.4	52.1
Rules which were awaiting final action	52.4	58.5
Rules which were completed	36.1	49.2

TABLE J

ATTORNEYS' FEES AS A PROPORTION OF TOTAL COSTS AUTHORIZED FOR REIMBURSEMENT

Proceeding	Total Amount Atty's Fees (%)	Total Amount Atty's Fees and Related Cost (%)	Total Authorization
Vocational Schools	17,924.49 (53%)	24,677.49 (73%)	33,654.25
Prescription Drugs	630.00 (30%)	910.00 (44%)	2,070.00
Holder in Due Course	1,248.10 (40%)	2,703.60 (87%)	3,073.25
Hearing Aids	78,083.50 (81%)	83,289.50 (87%)	95,880.93
Funeral Practices	78,045.50 (55%)	90,782.50 (64%)	141,363.38
Protein Supplements	4,050.00 (12%)	5,455.00 (16%)	33,970.30
Opthalmic Goods	40,343.00 (32%)	54,591.00 (43%)	127,274.33
Food Advertising	46,368.00 (30%)	63,712.00 (42%)	153,075.48
Care Labeling	19,200.00 (33%)	21,506.00 (37%)	57,948.67
Used Cars	36,990.00 (28%)	51,308.20 (39%)	131,930.11
OTC Drugs	37,265.00 (40%)	38,015.00 (41%)	93,403.03
Credit Practices	56,275.00 (40%)	69,789.00 (49%)	141,986.24
Health Spas	48,934.00 (56%)	56,601.00 (65%)	87,399.00
Mobile Homes	46,945.00 (30%)	64,928.00 (42%)	154,558.81
R-Value	56,617.00 (60%)	58,048.00 (62%)	93,488.07
OTC Antacids	34,461.00 (27%)	54,339.00 (43%)	126,884.63
Children's Advertising	65,115.00 (20%)	72,308.20 (22%)	325,690.20
Total	668,494.59 (37%)	812,963.49 (45%)	1,803,670.38

(This table is derived from an FTC chart entitled, "Attorney Fees and Costs Compared to Total Budget as of Feb. 1, 1979.")

The FTC has been criticized for devoting a large proportion of the compensation funds to legal representation, and thereby converting the program into a "lawyers' relief fund." The cogency of this objection is difficult to assess, for several reasons. First, the statute does not provide any real guidance to the agency or indication of congressional intent on this point: it simply authorizes the Commission to reimburse the attorneys' fees and other expenses of participation, without suggesting what proportion of the fund should be allocated to legal representation. Secondly, there is no baseline against which to measure the compensation funds spent on attorneys' fees. Hearing observations and the few bits of hard data that area available[15] suggest that the uncompensated participants' legal costs were substantially higher in absolute terms than the funded groups; and perhaps also higher proportionately in relation to their total cost of participating. But the crucial questions are, how much higher, and why?

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[15] Some information was obtained from the FTC regarding staff man-hours logged to the core TRR proceedings. A large proportion of the hours logged represents staff attorney time. For purposes of illustration, a figure of $30 per hour was applied to the man-hour figures to generate some dollar comparisons to the compensated participants' attorneys' fees reflected in Table J and Appendices G and H. These figures suggest that the FTC attorney expenditures were substantially greater than those of the compensated participants, although it must be remembered that the staff

Answering these questions would require fairly detailed information from a wide range of participants on matters such as number of billable hours invested in different representation activities; experience and qualification of the lawyers performing the work, rates charged, and the like. Since this sort of information is not collected by the FTC (or, apparently, by other agencies or organizations), the most that can be done is to examine some general measures of participant activity in TRR proceedings, to see how the consumer groups compare to other participants.

Table K compares consumer and industry participation at the major stages of the seven "core" proceedings.

The first two columns indicate that participation by individual consumers and consumer groups is generally negligible during disputed issue proposals and prehearing motions practice—which is not surprising, since most compensation applications were not filed and acted upon until after these stages had passed.[16] It is also likely that these procedural opportunities would be used more intensively by rule-opponents than by rule-supporters,[17] and most of the groups which were funded in the early proceedings tended to support the rule proposed by the FTC. The proportions of direct witness testimony—with roughly twice as many industry as consumer representatives—have already been mentioned, and are relevant here only insofar as they may indirectly reflect the work of lawyers in selecting, recruiting and preparing witnesses.

A more direct measure of lawyers' activity during the hearings can be found in Table L, which shows the length of direct and cross-examination

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investigative report, helping to compile the rulemaking record, scheduling hearings, and responding to public inquiries.

Proceeding	Prehearing Man-hours	Imputed Cost (at $30/hr.)	Hearing Man-hours	Imputed Cost (at $30/hr.)	Total Imputed Cost
Food Advertising	15,500	$465,000	5,500	$165,000	$630,000
Funeral Practices	6,800	$204,000	4,800	$144,000	$348,000
Holder in Due Course	2,800	$ 84,000	(not available)		$ 84,000
Protein Supplements	4,100	$123,000	4,100	$123,000	$246,000
Care Labeling	(not available)		600	$ 18,000	$ 18,000
Hearing Aids	(not available)		3,500	$105,000	$105,000
Ophthalmic Goods	(not available)		(not available)		—

[16] *See* Appendices D and E.

[17] *See generally* Part One of the ACUS report to Congress on Magnuson-Moss rulemaking procedures. "Disputed issue proposals" were generally filed by individuals and groups who wanted to contest either the rationale or the factual support for the rule as proposed by the FTC. Prehearing motions were largely designed to seek discovery of the staff's "case" for the rule, or to delay or terminate the proceeding.

TABLE K

PARTICIPATION BY INDUSTRY[1] AND CONSUMER[2] CONSTITUENT INTEREST CATEGORIES AT MAJOR STAGES OF CORE PROCEEDINGS, SEPT. 1, 1979

	Disputed Issue Proposals		Prehearing and Hearing Motions		Hearing Testimony		Rebuttal		Post-Record Comments		Oral Presentations	
	N	%	N	%	N	%	N	%	N	%	N	%
Food Advertising:												
Consumer	1	2.2	0	0.0	14	10.1	1	5.0	101	60.8	N/A	
Industry	37	80.4	23	100.0	27	19.5	8	40.0	50	30.2	N/A	
Total[3]	46	(100)	23	(100)	139	(100)	20	(100)	166	(100)	N/A	
Protein Supplements:												
Consumer	0	0.0	0	0.0	10	19.6	1	50.0	N/A		N/A	
Industry	11	78.6	3	100.0	3	5.8	1	50.0	N/A		N/A	
Total[3]	14	(100)	3	(100)	51	(100)	2	(100)	N/A		N/A	
Care Labeling:												
Consumer	0	0.0	0	—	6	9.5	1	7.1	21	22.1	N/A	
Industry	10	100.0	0	—	35	55.5	13	92.9	56	58.9	N/A	
Total[3]	10	(100)	0	—	63	(100)	14	(100)	95	(100)	N/A	
Holder in Due Course:												
Consumer	0	0.0	0	0.0	1	2.9	1	16.7	3	12.5	N/A	
Industry	5	83.3	6	100.0	20	57.1	4	66.7	14	58.3	N/A	
Total[3]	6	(100)	6	(100)	35	(100)	6	(100)	24	(100)	N/A	
Ophthalmic Goods:												
Consumer	0	0.0	0	0.0	26	14.0	4	40.0	20	33.9	2	40.0
Industry	3	50.0	4	100.0	89	47.8	5	50.0	26	44.0	3	60.0
Total[3]	6	(100)	4	(100)	186	(100)	10	(100)	59	(100)	5	(100)
Hearing Aids:												
Consumer	0	0.0	1	2.2	49	24.6	1	20.0	66	15.4	N/A	
Industry	7	100.0	44	97.8	94	47.2	3	60.0	300	69.8	N/A	
Total[3]	7	(100)	45	(100)	199	(100)	5	(100)	430	(100)	N/A	

TABLE K

PARTICIPATION BY INDUSTRY[1] AND CONSUMER[2] CONSTITUENT INTEREST CATEGORIES AT MAJOR STAGES OF CORE PROCEEDINGS, SEPT. 1, 1979—Continued

	Disputed Issue Proposals		Prehearing and Hearing Motions		Hearing Testimony		Rebuttal		Post-Record Comments		Oral Presentations	
	N	%	N	%	N	%	N	%	N	%	N	%
Funeral Practices:												
Consumer	0	0.0	1	3.8	71	21.7	6	13.0	642	66.8	5	35.7
Industry	5	100.0	24	92.3	93	28.4	35	76.0	176	18.3	6	42.9
Total[3]	5	(100)	26	(100)	327	(100)	46	(100)	961	(100)	14	(100)
Total, All 7 Proceedings:												
Consumer	1	1.0	2	1.9	177	17.7	15	14.6	853	49.2	7	36.8
Industry	78	82.9	104	97.2	361	36.1	69	66.7	622	35.9	9	47.4
Total[3]	94	(100)	107	(100)	1000	(100)	103	(100)	1735	(100)	19	(100)

1. Includes: Retailers, fee-for-service professionals, manufacturers and wholesalers, trade and professioal association.
2. Includes: Individual consumers and consumer groups.
3. Totals may include participants other than consumer and industry representatives.

TABLE L

COMPARISON OF DIRECT AND CROSS-EXAMINATION TIME BY WITNESS ATTITUDE TOWARD RULE

(Average Number of Transcript Pages)

	Pro-Rule Witnesses		Anti-Rule Witnesses	
	Direct	Cross	Direct	Cross
Protein Supplements	18.0	48.9	14.8	42.3
Food Advertising	14.0	42.7	14.0	30.8
Care Labeling	10.8	22.6	6.2	16.5
Ophthalmic Goods	7.1	17.5	10.0	29.7
Funeral Practices	7.8	28.6	7.3	35.9
Holder in Due Course	9.8	15.3	9.4	12.3
Hearing Aids	9.7	37.0	11.2	49.6
Average for All Proceedings	9.8	30.7	9.7	34.7

of witnesses in the core proceedings. That table suggests that there was an overall balance in the cross-examination of pro- and anti-rule witnesses: on the average, anti-rule witnesses were cross-examined more intensively in the Ophthalmic Goods, Funeral Practices and Hearing Aids proceedings, while pro-rule witnesses were questioned at somewhat greater length in the other four.

The aggregate figures for average length of direct and cross-examination in all seven proceedings are quite close for both pro-rule and anti-rule witnesses. Thus, the use of compensation funds to pay the legal fees of consumer group representatives seems to have produced a quantitative balance in cross-examination of witnesses. It may also have contributed to a qualitative balance. The FTC attorneys were generally younger and less experienced than their industry counterparts, and hearings observers found the quality of their questioning uneven. The compensated consumer group lawyers were often more experienced than the staff, and they frequently developed lines of questioning that had not been fully explored by the FTC's examination of the witness. On the other hand, it is difficult to say whether the presence of the consumer representatives might have influenced the behavior of the FTC staff—whether, for example, some staff attorneys might have prepared less carefully or questioned less thoroughly because they knew that a consumer group spokesman was waiting to make a particular point.

In the post-hearing stage, as Table K indicates, the "balance of advocacy" appears to be rather mixed. Industry representatives usually predominate during the rebuttal period, with two-thirds of all rebuttal submissions filed by industry members or their associations. By contrast, individual consumers and consumer organizations have a slight edge in the post-record comments. Two points must be noted about this last statistic, however. First, the aggregate "tilt" in favor of consumer comments is largely attributable to two proceedings, Food Advertising and Funeral Practices, where the consumer groups seem to have made a concerted effort to mobilize public comments. In addition, it is clear that many of the submissions are not particularly cogent or useful, especially in the proceedings where there are large numbers of post-record comments. Instead of analyzing the existing record and focusing issues for Commission deliberation, as the final comments are supposed to do,[18] some of these comments either try to introduce new evidence or argument, or repeat points that have been thoroughly explored on the record, or simply state that the writer supports or opposes the proposed rule.

The few comments that do evaluate the record in detail, however, can be extremely effective pieces of advocacy. The Commissioners rely heavily on the post-record comments and the oral presentations to highlight the key issues and arguments for their deliberations,[19] and effective representation in a TRR proceeding requires participation in these stages. In order to present cogent final comments and oral arguments, a participant needs to be familiar with the massive rulemaking record—either through participation at the hearing, or through reading documents or, in most instances, through both activities. It seems doubtful that many consumer groups could have generated the resources to master the records in detail without financial assistance. In this respect, the compensation program seems to have made it possible for consumer groups to participate on a more or less equal basis with industry spokesmen.

B. New Voices and "Grassroots" Participation

Another possible rationale or objective for a compensation program is bringing into the decisionmaking process new participants, as opposed to new evidence or argument. That is, increased involvement of "grassroots" consumer organizations and small businesses might be valued either as a means of increasing the perceived legitimacy and acceptability of the decision, or as a method of sensitizing the Commission to the views of underrepresented constituency groups, or as a matter of fundamental fairness to those who will be affected by a decision. Participation by diverse groups also might be favored as an indirect method of generating novel evidence and arguments on the theory that "outsider" groups will bring fresh perspectives to bear on the problems addressed by a proposed rule. These rationales for compensating public participants have a substantial element of policy or value preferences and they do not lend themselves to easy measurement or assessment.

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[18] The FTC's Rules of Practice provide that final comments "shall be confined to information already on the record and may include requests for review by the Commission of determinations made by the presiding officer." 16 C.F.R. § 1.13(i) (1978).

[19] *E.g.*, Interview with FTC Chairman Calvin Collier, Dec. 29, 1977; Interview with FTC Commissioner David Clanton, June 2, 1978; Interview with FTC Chairman Michael Pertschuk and General Counsel Michael Sohn, Dec. 6, 1978.

However, two points which have been forcefully made by critics of the FTC's compensation program deserve brief discussion. The first involves the funding of some groups to appear in multiple proceedings, and the second concerns the relationship between the compensated participants and the FTC staff.

1. The repeat players[20]. One point of contention in the controversies surrounding the Magnuson-Moss compensation program is the question whether a disproportionate share of the compensation funds have been given to a small group of "insider" organizations, predominantly from Washington, D.C. and California, who have applied for and received funding to participate in several proceedings.[21] To some degree, the statistics bear out the contention that compensation awards have been relatively concentrated in a few recipients. In the proceedings studied, 77 compensation awards were made to applicants from 15 different states and the District of Columbia.[22] Of this total, 31 groups were from the District of Columbia and 21 from California.[23] These figures involve some "double-counting" of groups which were funded in more than one proceeding. When those groups are counted only once, the total drops to 30 different groups funded under the program, of whom 14 were from California or the District of Columbia.[24] Moreover, Table M indicates that from the start of the compensation program through January of 1979, approximately 65 percent of all compensation funds obligated by the FTC went to just eight groups.

As previously noted, the experienced applicant had some substantial advantages over the neophyte, including knowledge of the existence and functioning of the compensation program, an accepted application format

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[20] The phrase is borrowed from Marc Galanter's analysis of the practical and theoretical advantages which a "repeat player" litigant has over the "one-shotter" plaintiff or defendant. *See* sources cited in note 297, *infra.*

[21] *See, e.g., FTC Public Funding of Private Groups Comes Under Attack in Senate Hearing,* Antitrust & Trade Reg. Reptr., May 3, 1979, at A-12, A-13 ("Another question raised about the program has been why three groups have received a large share of the funding."); *FTC Public Participation Funding is Focus of Commerce Committee Actions,* Antitrust & Trade Reg. Rptr., May 10, 1979, at A-18, A-19 ("Both [Senators] Danforth and Long said they were bothered by the fact that, according to Danforth's figures only 10 percent of FTC participation funds in 1976 and 1977 had been used to solicit information from small businessmen. According to Danforth, 49 percent of the money had been used by Washington-based groups and 41 percent goes to consumer groups which represent a very small segment of the population.").

[22] Data taken from Appendix A. For purposes of these calculations, joint or coalition applicants were considered independently. Thus, the joint award to a coalition of four environmental groups in the R-Value proceeding was considered as four awards.

[23] Data taken from Appendix A. Other states which scored relatively high were New York (5 awards), Massachusetts (4), and Wisconsin (3).

[24] *Id.*

TABLE M

Applicants Whose Authorizations Total to More Than $100,000

(*cumulated from authorizations in each of the Magnuson-Moss rulemakings through January 31, 1979*)

Applicant	Authorization Total	Rulemakings in Which Reimbursement Was Authorized
California Citizen Action Group	$221,075.54	Funeral Practices Ophthalmic Goods OTC Drugs Health Spas Thermal Insulation OTC Antacids
Americans for Democratic Action-Consumer Affairs Committee	$190,824.17	Funeral Practices Ophthalmic Goods Used Cars OTC Drugs Health Spas OTC Antacids
Council on Children, Media and Merchandising	$187.140.41	Food Advertising OTC Drugs OTC Antacids Children's Advertising
National Consumer Law Center, Inc.	$137,823.74	Vocational Schools Holder-in-Due-Course Credit Practices
National Council of Senior Citizens, Inc.	$127,870.48	Prescription Drugs Hearing Aids Funeral Practices OTC Antacids
Consumers Union of United States, Inc. (West Coast Regional Office)	$121,907.00	Health Spas Children's Advertising
National Consumers Congress/National Consumers League[*]	$109,071.67	Food Advertising Care Labeling Thermal Insulation
Consumer Action-San Francisco	$107,836.12	Vocational Schools Protein Supplements Ophthalmic Goods Used Cars
Total	$1,203,549.10	

[*] NCC merged into NCL on 6/27/77.

that could be adapted to the new proceeding, and a track record of performance in trade regulation rulemaking. Overall, groups which applied for funding three or more times had a success rate of better than 80 percent.[25]

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[25] *See* Appendix I, Frequency of Application and Authorization.

Another aspect of the concentration issue concerns the disparate size of compensation awards. The cost of reimbursing an applicant to participate in a single proceeding ranged from under a hundred dollars to more than a hundred thousand, largely because the applications varied enormously in the activities they proposed and the costs they projected. Applicants who received large compensation awards generally undertook a wide variety of activities, including both the presentation of technical evidence and extensive legal representation. Large awards consumed a substantial portion of the FTC's compensation budget: the ten largest authorizations, set forth in Table N, represent nearly 40 percent of the total compensation funds authorized during the period in question.

There is also a significant overlap between the groups appearing in Tables M and N. That is, some of the repeat applicants were also seeking, and receiving, relatively large awards. As previously noted, it was not possible to gather data that would permit comparison between the size of these awards and the amounts spent on participation by uncompensated participants.

A third component of the concentration issue is the frequent appearance of a few law firms as representatives of compensated consumer groups. The Washington, D.C. firm of Swankin and Turner, for example, represented four compensated clients in five proceedings.[26] The Bruce Terris law firm, also part of the Washington "private public interest bar," was even more active: firm members performed work for compensated groups in nine proceedings, including six in which they represented the Consumer Affairs Committee of the Americans for Democratic Action.[27]

The repeated appearance of these organizations and law firms might be considered a symptom of significant deficiencies in the compensation program if one assumes that the statute was designed to foster "grassroots" input from small local groups, or to bring in a variety of groups from geographically diverse regions. On the other hand, if the purpose (or at lease a

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[26] Swankin and Turner represented the National Consumer Congress in Care Labeling and its successor organization, the National Consumers League, in the R-Value rulemaking. Other clients included the Automobile Owners Action Council in the Used Cars proceeding, the Continental Association of Funeral and Memorial Societies in the Funeral Practices rule, and Consumer Action of Washington, D.C. in the Food Advertising hearings.

[27] The six proceedings in which the Terris firm performed work for ADA-CAC were Funeral Practices, Health Spas, Ophthalmic Goods, OTC Drugs, Antacids, and Used Cars. They also represented the environmental groups in the R-Value proceeding, and the joint participation of Action for Children's Television and Center for Science in the Public Interest in the Children's Advertising TRR. Finally, the firm evidently performed some limited services for the Council on Children, Media and Merchandising in the Food Advertising Proceeding. (*See* Letter from Robert Choate, Council on Children, Media and Merchandising, to Bonnie Naradzay, Special Assistant for Public Participation, FTC, Sept. 7, 1976, requesting reimbursement of $1,417.00 paid to Bruce Terris.

TABLE N

THE TEN LARGEST AUTHORIZATIONS FOR REIMBURSEMENT TO AN APPLICANT IN A SINGLE MAGNUSON-MOSS RULEMAKING AS OF JANUARY 31, 1979

Applicant	Authorization Total	Rulemaking
National Consumer Law Center, Inc.	$132,256.24	Credit Practices
National Hearing Aid Society	$83,510.80*	Hearing Aids
Action for Children's Television *and* Center for Science in the Public Interest	$77,016.20	Children's Advertising
Consumer Union of United States, Inc. *and* Committee on Children's Television	$73,916.00	Children's Advertising
California Citizen Action Group	$64,228.00	OTC Antacids
Council on Children Media and Merchandising	$62,434.78	Food Advertising
Council on Children Media and Merchandising	$58,392.00	Children's Advertising
Americans for Democratic Action-Consumer Affairs Committee *and* National Council of Senior Citizens, Inc.	$57,474.35	Funeral Practices
National Consumers Congress/ National Consumers League**	$57,292.67	Care Labeling
The Housing Advocates	$54,752.85	Mobile Homes
Total	$721,273.89	

* NHAS was unable to use $34,364 of this authorization because of a successful solicitation that it sent to its members.

** NCC merged into NCL on June 27, 1977.

major purpose) of the program is to produce testimony based upon sound research and expert legal representation, then it seems efficient to prefer groups and lawyers who already know the ropes and have demonstrated their competence in prior proceedings. In theory, at least, the "repeat player" has substantial advantages over the "one-shot" or neophyte participant, including "expertise, economies of scale, low start-up costs . . . informal relations with institutional incumbents and bargaining credibility.[28] The behavior of participants on the industry side of TRR controversies seems to confirm this observation, since there were several instances in which individual lawyers and law firms appeared on behalf of different clients in different proceedings.[29] Former FTC officials, including two ex-commissioners, were also active in representing rule-opponents. The degree of concentration among law firms representing industry clients was not as great as that observed among counsel to consumer groups, but this may be partly attributable to the existence of a larger pool of trade regulation lawyers who are willing and able to represent industry clients.

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[28] Galanter, *Afterword, Explaining Litigation,* 9 Law & Society Rev. 34 (1975); *see also* Galanter, *Why the "Haves" Come Out Ahead,* 9 Law & Society Rev. 95 (1974).

This latter observation raises a second point concerning the concentration issue: there are several possible reasons for the presence of "repeat player" groups and law firms, and some of them would not be affected by the FTC's strategies for implementing the program. Dominance by "repeat players" could come about because the Commission's outreach efforts were inadequate to inform many potential applicants, or because the statute or the Guidelines gave undue weight to factors such as experience or expertise, or simply because the "universe" of potential applicant organizations was small to begin with. There is some evidence that each of these factors played a part in the FTC program.

As previously discussed,[30] the Commission did not mount a systematic effort to notify potential applicants until near the end of the period covered by this study, and so there are no data measuring the success of these activities in attracting a more diverse group of compensation applicants. But even with an active outreach program, it is not clear that there are significant numbers of potential applicants to be reached. There are apparently no reliable current statistics on the total number or size of private-sector consumer advocacy organizations in the nation, but published estimates suggest that the total is small—perhaps less than a hundred in all—and that many of these groups are ephemeral, shoestring operations.[31] An organizaation which is living a hand-to-mouth existence, relying on a small staff and volunteer labor, probably cannot afford to divert a large proportion of its limited manpower to a major project like a TRR, even with compensation, unless the subject-matter is very high priority for the group. It may be significant that two of the "repeat player" consumer groups interviewed during this study had decided not to participate in future TRR proceedings, in part because the work on FTC rules disrupted normal operations and jeopardized other fundraising activities.[32] Other potential applicants may have anticipated these problems and decided not to apply. Thus, it may simply be unrealistic to expect that a much more diverse lot of consumer group applicants could be recruited to participate in TRR proceedings.

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[29] *E.g.,* the firm of Leighton & Conklin represented the Clorox Company in the Care Labeling rule, the National Manufactured Housing Federation in Mobile Homes, and the Grocery Manufacturers of America in Children's Advertising; Thomas Vakerics appeared on behalf of the Hearing Aid Industry Conference in the Hearing Aids proceeding, and the urea foam insulatic manufacturers in the R-Value proceeding; Edward Groobert represented the American Automobile Leasing Association in the Used Cars proceeding, and the American Optometric Associaton in the Ophthalmic Goods TRR. There was also some duplication of representation when the subject-matter of different rules was related, so that a lawyer representing a single client might be active in multiple proceedings. Examples include Food Advertising, Protein Supplements, and Children's Advertising, all of which touched on the marketing of food products; Holder In Due Course and Credit Practices, which dealt with consumer credit; and OTC Drugs and OTC Antacids, which concerned propriety nonprescription drugs.

[30] *See* text accompanying notes 229-241, *supra.*

[31] For example, J. Berry, Lobbying for the People 14 (paper ed. 1977) surveyed lobbyists of national public interest groups with offices in Washington, D.C. In his total of 83 organizations interviewed, which he estimated to be "an extremely high percentage—surely above 80 percent—of the true number of public interest groups that existed at the time of the interviewing" in 1972-73, he found a total of 13 consumer groups. Snow and Weisbrod, relying

Even if the FTC had explicitly adopted the objective of reducing the number of compensation awards made to the repeat players, it is not clear whether the agency could have done anything more than expand its outreach activities under the existing criteria. Since there was rarely a substantial overlap among the activities proposed by funding applicants in a particular proceeding, the FTC had little room to exercise its discretion in favor of groups which had not previously been funded.[33] On the other hand, the Guidelines' emphasis on the prior experience and demonstrated competence of the applicant gave the successful repeat player a decided preference.

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on secondary sources, found that "[b]y 1973, there were more than 80 national, state, and local non-profit consumer organizations supplying information to consumers and attempting to influence the formation of governmental and privately sponsored consumer protection programs." Snow & Weisbrod, *Consumerism, Consumers and Public Interest Law,* in Public Interest Law: An Economic and Institutional Analysis 395, 396 (B. Weisbrod, J. Handler & N. Komesar, eds., paper ed. 1978). The Council for Public Interest Law, focusing more narrowly on public interest law centers (which they defined as "nonprofit, tax-exempt groups that devote a large share of their programs to providing legal representation to otherwise unrepresented interests in court or administrative agency proceedings involving questions of important public policy"), located a total of 92 groups—only seven of which specialized in consumer protection matters. Council for Public Interest Law, Balancing the Scales of Justice: Financing Public Interest Law in America 81, 83 (1976). This study also found that "[c]onsumer and women's law centers tend to be the smallest in the universe of public interest law. Together, the 12 groups in these two areas have received only three percent of all contributions made to public interest law . . . and virtually all have annual incomes of less than $300,000." *Id.* at 95-96. Similarly, J. Berry, *supra* at 198, discovered that approximately half of the organizations he studied had been created within the five years preceding his survey.

[32] Interview with Michael Heffer, Co-Director, San Francisco Consumer Action, Nov. 2, 1979; Interview with Robert Choate, Chairman, Council on Children, Media and Merchandising, March 23, 1979.

[33] There is another possibility: since the standards for awarding compensation are highly judgemental, the FTC could have manipulated the results by adopting a *sub rosa* policy of ruling against repeat players on other grounds—for example, by finding flaws in the quality of the work they proposed, or by manipulating the "interest" or "financial inability" tests. No evidence has been found that any officials administering the program took this approach. It would have been difficult to bring off successfully, since the compensation program was highly visible and controversial, and many people were involved in compensation decisions.

The Commission might have amended the Guidelines to provide that, all else being equal, receipt of prior grants would be a negative factor in decisions on a current compensation application, or to state that no applicant could receive more than a fixed maximum dollar amount in a single year. However, there is a serious question whether the statute would permit the Commission to reject an otherwise eligible applicant on such grounds. As a matter of logic and statutory construction, it would be anomalous for the FTC to conclude that an applicant's participation was necessary to provide adequate representation of an interest not protected by existing parties, and then to disqualify the applicant because it had performed a similar service in another proceeding. Unless there is a surplus of qualified applicants in a particular proceeding, the agency administering a compensation program may be left with the choice of funding repeat players or letting the applicant's position remain unrepresented. Since the Magnuson-Moss Act compensation provision directs the agency to compensate unrepresented interests, the latter choice may not have been available to the FTC.

2. Supporting the staff position. A related criticism of the FTC's compensation program is the charge that the funds have been used primarily to assist groups which favor the staff's proposed rule—that the Commission has "liberally showered taxpayer dollars over groups likely to agree with and support their basic position in the proceeding.[34] On this issue, the FTC and its critics have sharply different versions of the relevant facts. In one report, for example, an industry representative is quoted as saying that "the FTC distributes 95 percent of its funds to regulation supporters," while a Trade Commission official responds that "the great majority of aid recipients have opposed staff proposals in one way or another."[35] Both spokesmen probably could marshall supporting data for their claims, because the supporters and opponents of the compensation program seem to be operating at different levels of generality or abstraction. That is, the industry critics generally focus upon whether the compensated participants generally favor or oppose issuance of some rule to govern the area in question, while the Commission emphasizes more specific nuances in position: does the applicant think that some rule provisions should be modified, or will the group produce some new information or analysis if funding is granted?

The FTC seems to have the better of this argument. Trade regulation rulemaking under the Magnuson-Moss Act is predominantly a process of reasoned decision-making in which the participants' attitudes toward the proposed rule are less significant than the basis or support they have for those views—the data and arguments which tend to demonstrate why a particular outcome would be desirable. In such a process, the applicant group which agrees with staff that the proposed rule should be adopted in its present form may still serve a useful function if it produces new information that could assist the decision-makers. Also, the argument that the compensated participants agreed with staff, overlooks the possibility that staff personnel and staff policy positions may change during the course of a protracted TRR proceeding. This happened with some frequency during the course of this study. In the seven "core" proceedings, for example, there were at least three rules[36] in which the original staff attorneys left the rule after the conclusion of hearings, and a new staff was assigned before final Commission action. These new rulemaking staffs, who were less committed to the original rules than their predecessors and more sensitized to the anti-regulatory climate of opinion prevailing at the time, recommended substantial cutbacks in the TRR's, and as a result the original overlap in position between staff and compensated participants vanished. By that time, it would have been difficult if not impossible for a new group to enter and master the record sufficiently to mount a convincing case for the original rule.

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[34] Prepared Statement of Richard J. Leighton, Special Counsel, Grocery Manufacturers of America, Inc., in *Oversight Hearings Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science and Transportation,* Sept. 28, 1979, at 5. The portion of the testimony quoted on the test related only to the Children's Advertising proceeding.

[35] *Public Participation Under Attack,* National Journal, Oct. 13, 1979 at 1678.

At the same time, there are some practical reasons why there is less need for independent public participants in these proceedings than in many other regulatory areas. Most of the TRR hearings were adversary proceedings in substance as well as in form, with the FTC staff and the target industry as the principal adversaries. Some rulemaking staffs attorneys may have lacked resources or expertise, but generally they were not wanting in motivation or effort to build a record supporting the proposed rule. Consumer and other public interest groups should have a less crucial role to play in this situation than they would if the agency were more sympathetic to the regulated interests, if not actually "captured" by them.

C. Impact of Compensated Participation on Agency Decisions

One important question that arises from the attempt to evaluate the Magnuson-Moss compensation program is, does the funding of public participants make any difference in final agency decisions? Unfortunately, this is a question that is virtually impossible to answer with confidence, at least in quantitative or objective terms. The opinions of informed observers may be the best available information in this area.

1. Methodological problems. At the simplest level, the impact of the compensated participants can be equated with their success in winning acceptance of their position. In this approach, the principal inquiry would be whether or to what extend the final rule matches the compensated groups' preferred outcomes. Yet this seemingly straightforward inquiry presents some practical difficulties. In some instances, it is surprisingly difficult to determine what, exactly, the groups' positions are. The procedures did not require the participants to file detailed statements of the rule provisions they would prefer to have adopted, and in some situations the group representatives' positions seemed to shift as the proceeding unfolded. There is also a very real possibility that positions will be taken for tactical reasons rather than as a matter of actual preference. A consumer group might, for example, decide to support the staff's proposed rule, even though it favored a different approach, because it felt there was a better chance to gain approval of the staff version; or it might assert a fairly extreme position, in the belief that the Commission would ultimately cut the rule back to the level the group really wanted.

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[36] Hearing Aids, Funeral Practices, and Care Labeling. In a fourth proceeding, the Holder In Due Course amendment, a substantial dispute developed within the Bureau of Consumer Protection, with the staff attorneys favoring issuance of the amendment and the Bureau Director raising questions about the need for a rule and the adequacy of the record.

The more serious objection to the emphasis on "winning" as a measure of impact, however, is the fact that even a perfect match between one group's position and the final rule would not necessarily mean that the group's efforts had caused the agency to adopt that approach. It is always possible, for example, that another spokesman—staff, or a pro-rule trade association—had a similar position and did more than the compensated participant to produce the final result. The proceedings were characterized by multiple, broadly-framed legal theories, vague proof standards, and voluminous records. Usually there were several participants who had the same or similar positions regarding the rule. In this setting, it was rarely possible to single out one piece of evidence or one participant's performance that clearly made a difference in the final result. It is also possible, in an adversary system, that the decisionmaker's acceptance of one party's position is less a reflection of the proponent's effectiveness than an indication of the opponent's ineffectiveness.

A further complication arises from the fact that Magnuson-Moss rulemaking is not a pure adversary process; factors other than the nature and quality of the record built by the parties can influence the outcome. The policy preferences of the individual Commissioners and the general political climate of the times, especially the anti-regulatory and anti-FTC attitudes evident in Congress and the media during part of this study, were not irrelevant to the content of the final rules issued by the Commission. Organizational or bureaucratic forces within the agency may also play a role. By the time a rule reaches the public hearing stage, it may have the force of considerable momentum behind it, and radical revisions will often create difficult problems for the agency.[37] Thus, in the absence of unusual circumstances, it may be unrealistic to expect that public participation, whether compensated or uncompensated, would produce anything beyond modest expansion or contraction of rule coverage, or some adjustment of the remedial provisions.

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[37] The high cost and public visibility of rulemaking proceedings under the Magnuson-Moss Act may make it embarrassing to the agency to scrap a rule entirely after it has been noticed, or to water it down too drastically. Conversely, any attempt to broaden or strengthen the

Since final rules can be affected by so many forces, an accurate assessment of the impact of compensated participants would require a tracing of the cause-and-effect relationship linking participation to outcome. Any attempt to do so, however, raises additional measurement problems. On the other hand, important effects of participation might not be reflected on the record or disclosed by interview subjects. The presence of an aggressive pro-rule consumer group, for example, might deter the staff or the Commission from abandoning a rule provision in the face of industry opposition; or the cross-examination and rebuttal submissions of a compensated group might expose weaknesses in opposing evidence that would lead the decisionmakers to avoid reliance on the challenged material. On the other hand, apparent effects that can be traced on the record might not reflect the real basis of decision. The post-hearing reports and final statement of basis and purpose are in some measure advocacy documents because they are designed to marshal support for the positions taken rather than simply to reflect the process of decisionmaking. This means that apparent reliance on particular record material may be more tactical than real. For example, a finding in a staff report could be supported by a string of 20 citations, even though only one or two of the sources cited really influenced the determination in question; or a report-writer may decide to place primary reliance on ''independent'' witnesses rather than those mobilized by the staff, on the theory that the outside witnesses would appear more impartial and credible. Consideration of these possibilities, in short, involves the assessment of tactics and motivations which the actors are not likely to discuss candidly. Indeed, they may not even be fully aware of them.

Finally, it is arguable that the effectiveness of participation should not be judged by reference to ''winning'' or prevailing on the final rule at all. Just as the criminal defendant may have had effective representation by counsel even when he does not go free at trial's end, so also a rulemaking participant may have had his views effectively presented and carefully considered by the agency, even though they are ultimately rejected. This approach, however, moves the inquiry even farther away from basically objective measures to subjective assessment of the quality of representation and the substantive validity of the positions advocated.

Having noted these many reservations and limitations, it may nevertheless be useful to examine one completed proceeding in detail for the purpose

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rule substantially would invite objections from rule-opponents that they had been denied adequate notice and opportunity to prepare. If the agency sought to resolve the notice objection by re-proposing a revised rule, this would substantially increase costs and delays, particularly, if the original staff investigation had not included the relevant points.

of exploring whether it is possible to make meaningful generalizations about the influence of the compensated groups.

2. The ophthalmic goods rule. One of the few rules adopted in final form by 1979 was the Ophthalmic Goods or Eyeglasses TRR, which involved a proposal to remove bans on the price advertising of ophthalmic goods and services that had been imposed by state action or by private associations. Five consumer groups were funded to participate in the Eyeglasses rulemaking, and approximately $130,000 in compensation awards was authorized by the Commission.[38] Two of these groups received relatively small amounts—approximately 12 percent of the total authorization between them—and they played rather minor roles in the proceeding. ACORN, the Arkansas Community Organizations for Reform Now, and NYPIRG, the New York Public Interest Research Group, both received compensation to serve as a consumer group representatives at one of the regional hearings on the rule, and they also presented testimony. NYPIRG's General Counsel discussed the ways in which the Supreme Court's recent decision in the *Virginia Pharmacy* case,[39] extending First Amendment protections to price advertising, might affect the need for the TRR, or the rationale supporting it.[40] The ACORN witness presented policy testimony in favor of the proposed rule, based on the organization's experience in representing the interests of low-and-moderate-income consumers. That experience included a survey of eyeglass prices in Arizona and Texas which the group had conducted before they had become involved in the FTC proceedings, as well as some affidavits they had collected from consumers stating that high prices had made it difficult or impossible to purchase proper eyeglasses.[41]

The ACORN and NYPIRG testimony had little visible impact on the post-hearing decision documents. ACORN's witness was cited several times in the Presiding Officer's and staff's reports for policy or general fact matters, such as the propositions that dispensers of eyeglasses sometimes refuse to give consumers copies of their prescriptions,[42] or that consumer benefit may be increased if the proposed rule drives high-cost, inefficient sellers out of the market.[43] The NYPIRG testimony is apparently cited only once in these reports, when the Presiding Officer relies on it for the proposition that disclosure of even limited information is better than none, since it may lead consumers to ask more and better questions of sellers.[44] Neither group is cited in the statement of basis and purpose accompanying the final rule.[45]

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[38] *See* Appendix A.

[39] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Later during the pendency of the Ophthalmic Goods TRR proceeding, the Supreme Court decided Bates v. State Bar of Arizona, 433 U.S. 350 (1977), which extended the First Amendment protections for price advertising to professional services.

[40] Statement of Dennis Kaufman, HX 207, pp. 20148-20153.

[41] Testimony of Elena Hangii, Tr.

[42] See Staff Report at 241-42, 246, 254. An example of a similar use of the ACORN testimony in the Staff Report is the citation in support of the proposition that regulatory standards are a more rational means of quality assurance than bans on price advertising. *Id.* at 210.

[43] Presiding Officer's Report at 116. Examples of other points from the ACORN testimony relied upon by the Presiding Officer include the following: consumers are able to use

The major consumer group participants who received compensation in the Ophthalmic Goods proceeding seemed to have a much more substantial impact on the decision, if one can judge from the documentary record. The Consumer Affairs Committee of the Americans for Democratic Action (ADA) was the primary procedural representative for the consumer interest. ADA received funding to act as group representative at the Washington and Cleveland hearings, submitted a rebuttal statement, took the lead in bringing the consumer group participants together to prepare a joint post-record comment, and made an oral presentation to the Commission as the rule neared adoption.[46] The other two compensated consumer groups presented some of the most important empirical research introduced into the rulemaking record, judging from the prominence which their testimony was accorded in the post-hearing decision documents, and they also differed sharply on some of the major issues in the proceeding.

The California Citizen Action Group (CalCAG) and San Francisco Consumer Action (SFCA) were funded to undertake separate but "coordinated" field research projects. CalCAG's study had two principal components, consumer awareness and the effectiveness of state regulation. On the former topic, CalCAG subcontracted with a commercial survey research firm to explore the extent of consumer knowledge about eyeglass prices, the kinds of price-related information that consumers were able to understand and use, and the influence of price on the decision to purchase eyeglasses.[47] The second component of the CalCAG testimony was an evaluation of the California state boards which regulated the industry and the trade and professional associations representing sellers in California.[48] San Francisco Consumer Action took a different approach. The group had previously completed a study of eyeglass prices in California, a state which prohibited price advertising, and it obtained funding from the FTC to conduct a

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and understand price information, and advertising is not demeaning to the profession (*id.* at 21); significant numbers of consumers lack the money to purchase ophthalmic goods and services (*id.* at 62–63); professional ethical standards and quality control by wholesale sellers of ophthalmic goods will prevent declines in quality of merchandise if the rule is adopted (*id.* at 93–94, 109–110).

[44] *Id.* at 23–24.

[45] *See* 43 F.R. 23992-24008 (June 2, 1978).

[46] *See* Appendix A.

[47] Application for Compensation of California Citizen Action Group in Ophthalmic Goods Proceeding, April 30, 1976.

[48] *Id.*

similar study in Arizona, a state that allowed eyeglass sellers to advertise their wares.[49] Perhaps because of these differences in methodology and focus, the two groups' field research projects led to rather different conclusions.

The CalCAG study produced the expected results. In the survey, consumers were shown a sample advertisement for eyeglasses priced under twenty dollars, and were asked their attitude toward the product. Most of the respondents said they were suspicious of the quality of the advertised glasses, or thought they would end up buying a much more expensive pair if they went to the advertiser. Then the researchers provided the respondents with information about the eyeglass industry, including fabrication and distribution costs and quality control practices. Following these disclosures, the interviewers asked the respondents again whether they would be interested in the cheap eyeglasses, and a higher proportion said they would. From this, it was inferred that consumers lacked the information they needed to make informed purchase decisions on eyeglasses, but that they are able to make reasoned decisions when exposed to truthful advertising.[50]

By contrast, the SFCA study, titled "There's More Than Meets the Eye," [51] was a bit of a bombshell. Its principal finding was that despite the absence of legal restraints in Arizona, there was virtually no price advertising of eyeglasses, and no lessening of the dispersion of eyeglass prices as predicted by economic theory.[52] Several reasons for this lack of price competition was suggested. The norms of the professional culture held that price advertising by optometrists and opticians was distasteful, if not unethical.[53] Moreover, market research by sellers had found, and this study confirmed, that price was not an important motivating factor in eyeglass purchases or in consumer choice of other health-related goods and services.[54] At the same time, style and fashion had become increasingly important to eyeglass wearers in recent years, and this factor was particularly significant for the most profitable segment of the market, wealthy consumers.[55] As a result, sellers found little competitive advantage in price advertising. SFCA also doubted whether price advertising, if it occurred, would be an unmixed blessing for the consumer because it might lead to market dominance by large multistate corporations which would be less responsive to consumer complaints and less susceptible to effective supervision by state regulatory officials.[56] In short, SFCA concluded, the rule "is likely to have little effect and may be worse than doing nothing."[57]

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[49] Application for Compensation of San Francisco Consumer Action in Ophthalmic Goods Proceeding, April 15, 1976.

[50] *See generally,* Tr. 3648–3730 (testimony of Paul Fine); HX 279, HX 228.

[51] HX 397.

[52] Tr. 6301–6302 (testimony of Delia Schletter).

[53] *Id.* at 6303.

[54] *Id.* at 6305, 6308.

[55] *Id.* at 6305.

This was not a message that either the FTC staff or the pro-rule consumer groups wanted to hear, and the witness who had delivered the bad news was subjected to a long and gruelling cross-examination.[58] This included a stinging credibility attack by counsel for ADA, the consumer group representative at the Washington hearings. He suggested that SFCA had misrepresented facts in its compensation application and had violated the terms of its compensation award by substantially modifying its study design without informing the FTC.[59] Although reports from an observer involved in this study indicated that the witness was shaken and seemed evasive under intensive questioning, she stuck by the major point of her testimony: the TRR as proposed was either useless or harmful, and it needed to be greatly expanded if it was to provide any benefit to consumers.

This dispute among consumer groups carried forward into the rebuttal stage of the proceeding. In the course of her testimony, the SFCA witness had criticized the CalCAG study. CalCAG responded by charging her with naivete, misrepresentations, incompetence, and sloppiness in conducting her own research.[60] Under this barrage of criticism, SFCA moderated its stand somewhat. In its own rebuttal submission, SFCA sought to emphasize the areas in which it agreed with CalCAG, concluding that "the conflict between our policy conclusions . . . is, we feel, largely based upon the different evidence available to us, regarding the realistic limitations on possible price advertising . . . and regarding the probabilities of accompanying adverse consumer consequences."[61] Later, SFCA and CalCAG joined in a post-record comment submitted by all the compensated consumer groups, which supported the proposed rule and urged that it be strengthened.[62]

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[56] *Id.* at 6307.

[57] *Id.* at 6310.

[58] *See generally id.* at 6339–6509.

[59] *Id.* at 6354–6356:

> [Consumer group representative]: Page six of your application says: [the] "State of Arizona does not ban price advertising and so constitutes an ideal social laboratory in which to investigate the long-term impacts of price advertising,"—now, this is underlined in the application—"which can be directly observed."
>
> Now, can price advertising be directly observed in Arizona?
>
> [Witness]: The policy of price advertising can be.
>
> [Consumer group representative]: I didn't ask you that.
>
> . . . . .
>
> Let me go on to page seven of your application.
>
> "In California, price advertising is presently absent. In Arizona, price advertising is present."
>
> Now, wasn't——
>
> [Witness]: That was an assumption.
>
> . . . . .
>
> [Consumer group representative]: Did you ever notify the F.T.C. that you couldn't test out in Arizona the effect of actual price advertising?
>
> [Witness]: . . . [N]o.

[60] *See* Rebuttal Comments of California Citizen Action Group 18–25, Ophthalmic Goods record 17273, 17293–17300.

In the post-hearing stages, the CalCAG and SFCA studies were frequently cited and discussed in both the Presiding Officer's and the staff's reports. CalCAG's survey testimony contained perhaps the best data on the record concerning consumer knowledge of price considerations, and it was repeatedly cited by the staff and the Presiding Officer to support the conclusion that consumers needed and would be able to use price information. However, the reports did not discuss a plausible alternative interpretation of the study—that consumers might remain skeptical of price advertising unless they had been educated about the economics of the eyeglass industry by a person or source of information that they trusted.

The SFCA study was also used rather selectively. The Presiding Officer noted some of the reasons that SFCA had suggested for the lack of price advertising, such as ethical restraints within the profession and the importance of non-price considerations to consumers, and concluded that the actual extent of price advertising under the proposed rule would probably depend upon competitive conditions in the particular jurisdiction.[63]

The FTC staff took a different approach in their report. They found support for their position in SFCA's data, while ignoring the group's argument that other factors would prevent price advertising. Following up on lines of cross-examination they had developed at the hearing,[64] staff argued that SFCA had failed to adjust its Arizona data for inflation before making price comparisons to its earlier study in California. When this adjustment was made, staff argued, the data showed substantially lower prices in Arizona—perhaps as a result of potential competition or the threat that other firms would start advertising if prices rose too high.[65] Staff also disputed SFCA's finding that Arizona consumers were not aware of price considerations, asserting that the SFCA data showed Arizona respondents to be more informed about eyeglass prices than the California consumers who were surveyed in the CalCAG study.[66] Finally staff adopted and relied upon SFCA's finding that the quality of ophthalmic goods and services is not dependent upon the price charged.[67] The Commission's statement of basis and purpose accompanying the final rule tracked the Staff Report in its treatment of the CalCAG and SFCA studies[68]—which is not surprising, since the two documents were both drafted by the staff attorneys assigned to the rule.

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[61] Rebuttal Comment of San Francisco Consumer Action, Nov. 15, 1976 at 3, Ophthalmic Goods Record 17428, 17431.

[62] *See, e.g.*, Presiding Officer's Report at 60–62, 116, 124, 136, 142, 158, 159, 170–71; Staff Report at 127–34, 145–49, 180, 267–68. CalCAG's testimony about the ineffectiveness of state regulation was also discussed and relied on; *see, e.g.* Presiding Officer's Report at 18 n.34, 27–28, 85–86; Staff Report at 100, 210, 213, 283, 291.

[63] Presiding Officer's Report at 121. *See also id.* at 126:

> The precise economic effect of the rule on small business . . . cannot be determined with any degree of precision. There are other variables which may operate to enhance or mitigate the economic effect of other restraints on competition in the relevant market place.

[64] *See* Tr. 6432–6446.

[65] Staff Report at 97–101. The Presiding Officer also noted the potential competition theory, but gave less emphasis to it than the staff did. See Presiding Officer's Report at 121–22. As these sections of the reports indicate, there was other economic evidence in the rulemaking record supporting the potential competition theory.

By the time the Eyeglasses Rule reached the Commission, there were three major[69] differences between the FTC staff and the compensated groups, led by ADA.[70] The staff wanted to limit the rule to sales of goods. and defer action on related services like eye examinations until a follow-up rulemaking proceeding could be completed.[71] ADA, on the other hand, felt that the record was sufficient on the services issue, and that the additional coverage was necessary to make the rule effective.[72] The consumer group's viewpoint prevailed on this point,[73] and services were included in the final rule.[74] However, ADA was not successful in urging the Commission to include two other rule provisions which would override state laws limiting the use of branch offices by sellers of eyeglasses, or prohibiting optometrists from employing opticians.[75] Beyond their impact in advocating additional or different rule provisions, the compensated consumer groups were apparently influential in lending support to rule provisions that the staff favored. The ADA representative, for example, made a forceful presentation in favor of the staff's proposal to require that eye examiners give the patient a copy of his prescription,[76] and his advocacy probably helped to focus the Commission's attention on the significance of that provision.[77]

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[66] Staff Report at 144–45.

[67] *Id.* at 187, 191–92.

[68] *See* 43 F.R. 23996, 23999 n.130 (June 2, 1978) (CalCAG study shows consumer ignorance); 23995, text accompanying notes 65–66 (SFCA data shows lower prices in Arizona, attributable to potential competition); 23999, text accompanying note 127 (SFCA study cited for finding of price dispersion); 23997, text accompanying notes 100–104 (SFCA study cited on price-quality issue); 23997, text accompanying note 96 (CalCAG study cited for propostion that consumers do not regard price advertising as unprofessional).

[69] One area where there are relatively minor differences between the compensated consumer groups and the FTC staff concerned the topic of mandatory disclosures in advertisements for ophthalmic goods. There were two aspects to this issue, whether the states could mandate sellers to include certain disclosures in their advertisements (which could be used as a subterfuge to limit or prevent price advertising), and whether the FTC should mandate sellers to make certain disclosures.

On the first point, staff took a middle-of-the-road position. In the Staff Report, they recommended a general ban on state provision limiting or burdening price advertising with two exceptions: a list of three specified disclosures that would be acceptable for the states to impose, and a general proviso that advertising laws or regulations not limited to Ophthalmic Goods would not be prohibited. *See* Staff Report at 294–95. After issuance of the Report, staff modified its position slightly to add two more specified disclosures to its list. Memorandum from Albert H. Kramer, Director, Bureau of Consumer Protection, to Commission, Nov. 25, 1977, at 4–5. In its oral presentation, ADA sought to limit the list of mandatory disclosures that states could impose, arguing that any general standard which allowed states to add to the list would be impossible to implement and would generate litigation. Observation Report on Oral Presentations Before the Commission in the Ophthalmic Goods Proceeding, Dec. 7, 1977. Notwithstanding ADA's opposition, the final rule contained both of the exceptions suggested by staff and an additional, generic exemption: states could apply to the Commission for a determination whether a disclosure requirement "is reasonable and does not unfairly burden the dissemination of information." 43 F.R. 24007, § 465.5(c) (June 2, 1978).

The second disclosure issue was whether the TRR should require rather than permit sellers to disclose their prices to buyers by posting price lists, responding to telephone inquiries, and the like. Support for such a provision came mainly from CalCAG, and was resisted by the FTC staff as being beyond the scope or purpose of the rule. Staff Report at 292–93; Observation Report, *supra*. No mandatory disclosure provision was included on the final rule.

In retrospect, although the Ophthalmic Goods rulemaking seemed to be a particularly unlikely proceeding for the compensated consumer groups to have a major impact on the shape of the final rule, they did have some impact. The central issue in the proceeding—the effect of advertising bans on the price of goods and services—had been discussed at some length in the scholarly literature, and nearly 30 empirical studies, representing a variety of methodologies and conclusions, were introduced into the hearing record.[78] The FTC staff had developed a very tightly reasoned theory entering the proceeding and, judging from the language they included in the final statement of basis and purpose, it would have taken an overwhelming factual or policy showing to defeat the basic premise of the rule:

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[70] CalCAG also made an oral presentation to the Commission, but its primary objective was to summarize the record evidence supporting the proposed rule. Observation Report, *supra* note 337. Its main substantive difference with the staff position was on the mandatory disclosure issue discussed in note 337, *supra*.

[71] *See* Staff Report at 287-91.

[72] Observation Report, *supra* note 32.

[73] It may be that the Supreme Court's then-recent decision in the case of Bates v. State Bar of Arizona, 433 U.S. 350 (1977), had as much or more effect than the ADA's advocacy in inducing the FTC to include services in the rule. The *Bates* decision had extended First Amendment protections to the advertising of professional services. In *Bates* the Court also rejected two of the principal arguments relied upon by industry rule-opponents in the Ophthalmic Goods proceeding—that advertising would raise prices to consumers and lower the quality of goods and services. The principal industry spokesman in the Ophthalmic Goods proceeding began his oral presentation to the Commission by saying that the American Optometric Association was abandoning these arguments in light of *Bates*. Observation Report, *supra* note 337. Colloquy among the FTC Chairman, the Direcor of the Bureau of Consumer Protection and the ADA representative at the oral presentation indicated that staff wanted the narrowest and strongest rule possible in order to test the FTC's power to preempt state law *Id*. With some of the doubtful issues surrounding the professional services area resolved by the *Bates* case, the Commission may have felt that the inclusion of services would not jeopardize that goal.

[74] *See* 43 F.R. 24006-24008 (June 2, 1978).

[75] *Id*. The former issue, at least was included in the investigation leading toward a follow-up TRR on Ophthalmic Goods and Services. Observation Report of Commission Meeting, May 24, 1978.

[76] Observation Report of Oral Presentation, *supra* note 337.

[77] Interview with FTC Chairman Michael Pertschuk and General Counsel Michael Sohn, Dec. 6, 1978.

> The theoretical support for the conclusion that the failure to provide price information injures consumers is so strong that the Commission believes it could promulgate a trade regulation rule on this issue without additional direct empirical support. Nevertheless, in the course of this proceeding extensive research and survey analysis was undertaken . . . which provides strong verification of the theoretical expectation.[79]

The industry opposition to the proposed rule also seemed less strong and uniform in this proceeding than in most of the others studied. There are several possible reasons why spokesmen for the eyeglass dispensers did not mount a very vigorous defense. The industry was not united in its opposition to the rule, since some sellers wanted to advertise. In addition, recent Supreme Court decisions conferring constitutional protections on the price advertising of professional goods and services had undercut much of the basis for opposition to the rule;[80] and it is possible that the principal opponents of the rule adopted a strategy of saving their main effort for judicial review.[81] Whatever the reasons, opposition to the Eyeglass Rule was much less spirited than the resistance encountered in most other proceedings, and this factor probably made it less likely that the rule would change significantly as it went through the process.

In other proceedings, the circumstances seemed more favorable for the compensated consumer groups to affect the outcome substantially. In the Food Advertising hearings, the primary consumer group representative joined with industry members in opposing the staff's proposal to prohibit use of the words "natural" and "organic" in food advertisements on the ground that these words are inherently deceptive. The compensated group took the position that non-deceptive, informative definitions could be developed, and the FTC staff accepted this position in its final report. Even here, however, it is not possible to conclude that the compensated participant caused a change in the rule; some industry spokesmen were also actively attacking the staff's proposal, through similar testimony and cross-examination.

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[78] *See* Ophthalmic Goods Tr. at 11, 135, 300, 438, 673, 1283, 1546, 1679, 1850, 1886, 1905, 1963, 1965, 2052, 2100, 2129, 2625, 3106, 3299, 3648, 3879, 4082, 4116, 4223, 4524, 4612, 5711, 6264D, 6297.

[79] 43 F.R. 24001 (June 2, 1978).

[80] Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[81] The American Optometric Association and other petitioners won a judicial reversal and remand of the major provisions of the rule in American Optometric Ass'n v. FTC, No. 78-1461 (D.C. Cir., Feb. 6, 1980).

In short, the evidence for compensated groups' influence on agency decisions is not conclusive, but it does seem significant. The same could be said for any other participant's impact, particularly in proceedings like Ophthalmic Goods where the rule has considerable momentum behind it. Thus it seems necessary to consider the final dimension of the impact question, the quality of representation provided by the compensated groups.

This is perhaps the most subjective inquiry of all, since there are no generally accepted standards for defining or measuring quality of advocacy in a complex "hybrid" proceeding like Magnuson-Moss rulemaking. To supplement hearing observations, interviews were conducted with FTC personnel who had had an opportunity to observe the work of the compensated participants, and internal agency evaluations were reviewed.

The FTC Commissioners were generally enthusiastic about the participation of the compensated consumer groups. Both Chairmen who held office during the period covered by this study made public statements that the compensation program had made substantial contributions to the quality of Commission deliberations.[82] In interviews, Commissioners pointed out some of the benefits the saw from the public participation program: it made different perspectives known to the Commission,[83] or helped to bring major issues into focus,[84] or gave the Commissioners more confidence that they were deciding on the basis of a complete record.[85] None of the Commissioners interviewed were critical of the program or of the contributions of the funded participants.[86]

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[82] *E.g.*, Statement of FTC Chairman Calvin Collier, *Hearings on H.R. 3361 and Related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 498 (1977) ("Based upon our experience operating this program for a year and a half, my opinion is that its benefits to Commission proceedings is substantial."); Prepared Statement of Michael Pertschuk in Hearings on Regulatory Reform Before the Senate Comm. on the Judiciary, May 15, 1979, at 5 (FTC's decision-making process "emphatically" improved by participation of compensated groups) *See also* Pertschuk, *Listening to the Little Guy*, The Washington Post, June 26, 1979, at A-19 Col. 6.

[83] Interview with FTC Commissioner Elizabeth Hanford Dole, Nov. 2, 1979.

[84] Interview with FTC Chairman Michael Pertschuk, Dec. 6, 1978.

[85] Interview with FTC Chairman Calvin Collier, Dec. 29, 1977.

[86] The most skeptical of the Commissioners interviewed was Paul Rand Dixon, who felt that the compensated participants had done an adequate job but wished that it were possible to encourage public participation without government funding. Interview with FTC Commissioner Paul Rand Dixon, August 2, 1978. Time pressures prevented Commissioner Clanton from commenting at length on the compensation program during his interview. Interview with FTC Commissioner David Clanton, June 2, 1978.

At the operational levels of the agency, opinions were more mixed.[87] As might be expected, staff attorneys generally thought that the most important contribution of the funded participants was to present new evidence; they felt that the consumer groups' role in conducting cross-examination was less crucial, because the FTC staff was, they believed, adequately performing that job.[88] Presiding Officers, on the other hand, seemed to place primary emphasis on the consumer group representatives' role in balancing the hearings and providing additional perspectives; as one of them put it, the consumer representatives were not necessarily better than the staff, just different—and this was useful to the Presiding Officer.[89] Two of the Presiding Officers interviewed in this study explicitly noted that the consumer group lawyers were generally on a par with industry lawyers in ability and expertise although they seemed to be operating on much more limited budgets.[90] However, some interview subjects noted that the "public interest bar" seemed to be spread thin during the period of intensive FTC rulemaking, with the result that preparation was sometimes spotty and inexperienced junior associates frequently substituted for more expert senior partners in particular proceedings.[91] Evaluations of particular witnesses or written submissions ranged from "terrific,"[92] "outstanding"[93] and "one of the better consumer witnesses I have had the privilege to hear"[94] at the one extreme, to "repetitive",[95] "questionable"[96] and "fairly worthless"[97] at the other. Several staff members noted the problems of time pressure, lack of expertise, and underfunding that the consumer groups faced in trying to conduct surveys or other empirical studies.[98]

These characterizations are consistent with the impressions of the research staff who were involved in the Administrative Conference study of trade regulation rulemaking. The variances in perceived quality of testimony and advocacy among the compensated groups were not markedly different from what was observed among the unfunded participants. Within the constraints of a relatively small resource base, a rather cumbersome set of rulemaking procedures, and an array of vague legal theories that made it difficult for anyone to "win on the facts,"[99] the compensated consumer groups made a respectable showing.

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[87] To preserve the confidentiality of interview subjects and internal agency documents in this sensitive area, suppporting data will be cited as "Staff Evaluation 1," "Staff Evaluation 2," etc.

[88] *E.g.*, Staff Evaluations 4, 10, 13.

[89] *E.g.*, Staff Evaluations 1, 7, 11, 12.

[90] Staff Evaluations 11, 7.

[91] *E.g.*, Staff Evaluations 5, 7, 2, 4.

[92] Staff Evaluation 8.

[93] Staff Evaluation 3.

[94] Staff Evaluation 9.

[95] Staff Evaluation 11.

[96] Staff Evaluation 4.

[97] Staff Evaluation 6.

[98] Staff Evaluations 4, 5, 6.

In short, although the overall effects of the compensation program were neither clear nor dramatic, it apparently accomplished the intended result: additional relevant evidence was presented, and viewpoints were advocated which might have received less forceful or less thorough representation in the absence of funding. The most serious problems faced by the FTC in trade regulation rulemaking, however, involved more fundamental defects than the quality of the advocacy or information presented in individual proceedings. As discussed more fully in other portions of this study,[100] the Commission encountered a variety of problems in adapting to the new statutory procedures, in defining its legal theories, and in focusing the issues its rulemaking proceedings. The agency also miscalculated the practical limits imposed on its rulemaking powers by external reviewing bodies. Legally, if one can judge from the first two Magnuson-Moss rules to reach judicial review, the Commisson overestimated the amount of discretion conferred by the statute, particularly in the area of remedial policy.[101] Politically, it apparently far underestimated the strength of the opposition to its proposed rules, and toward the end of the period covered by this study the Commission had its rulemaking proceedings halted in midstream as the Congress debated measures to confine or reduce FTC rulemaking authority.[102] The compensation program could not really be expected to have much effect upon those basic problems and miscalculations, and there is no indication that it did. This was, in many respects, a particularly unfortunate time and place to test the concept of compensated public participation.

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99. *See* Part 2 of the Administrative Conference Study of Trade Regulation Rulemaking.

100. *See generally* Parts One and Two of the Administrative Conference Study of Trade Regulation Rulemaking Procedures of the Federal Trade Commission (1979, 1980).

101. *See* Part Two of the Administrative Conference Study, *supra* note 368 at ____.

102. *See, e.g., The Assault on the FTC,* Consumer Reports, March, 1980, at 149; Gellhorn, The FTC Under Siege, Regulation Magazine, January/February, 1980 at 33.

REPORT IN SUPPORT OF RECOMMENDATION 80-2

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INSTITUTIONALIZING THE ENERGY CRISIS: SOME STRUCTURAL AND PROCEDURAL LESSONS*

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* This Article is based on a report prepared for the Administrative Conference of the United States. The recommendations based on this report were subsequently adopted by the Conference at its 21st Plenary Session on June 5, 1980. The conclusions and opinions expressed in this Article are those of the author, however, and do not necessarily express the views of the Administrative Conference.

An explanatory *Glossary* for agency names is at page 597 *infra*.

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INTRODUCTION

On April 5, 1979, President Carter announced his intention to end federal price controls on domestic crude oil.[1] Under the authority of the Energy Policy and Conservation Act,[2] the President began to phase out these controls on June 1, 1979.[3] All controls on domestic crude oil will be lifted by October 1981.[4]

The wisdom of these controls has been vigorously debated and intensely criticized.[5] By lifting the controls the President has followed the recommendations of critics who have argued persistently that controls have serious adverse effects. These critics maintain, for example, that controls decrease domestic production of oil, thus increasing American dependency on foreign oil supplies, and give false pricing signals to consumers, thus encouraging excessive consumption.[6] In his speech of April 5, however, the President also emphasized a procedural reason for his decision: "In order to control energy price, production, and distribution, the Federal bureaucracy and red tape have become so complicated, it is almost unbelievable."[7]

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[1] Presidential Energy Address, 15 WEEKLY COMP. OF PRES. DOC. 609, 610 (Apr. 5, 1979) [hereinafter cited as Energy Address].

[2] 15 U.S.C. § 760(b) (1976).

[3] Energy Address, *supra* note 1, at 610.

[4] *Id.*

[5] *See, e.g.*, Bartlett, *There Is No Fuel Like Enough Fuel*, 25 INST. OIL & GAS L. & TAX. 247 (1974); Erickson, Peters, Spann & Tese, *The Political Economy of Crude Oil Price Controls*, 18 NAT. RESOURCES J. 787 (1978); Comment, *The Case for Decontrolling the Price and Allocation of Crude Oil*, 53 TEXAS L. REV. 1275 (1975). *But cf.* Wiener, *Monopoly and Phase III: The Consumer's Case Against Price Increases in the Oil Industry*, ANTITRUST L. & ECON. REV. Winter 1972-73, 43, 50 (federal antitrust action against oil producers would reduce excessive prices resulting from monopolization).

[6] Bartlett, *supra* note 5, at 248-50; Erickson, Peters, Spann & Tese, *supra* note 5, at 795-97; Comment, *supra* note 5, at 1289-90, 1296-97.

[7] Energy Address, *supra* note 1, at 610.

This Article focuses on the development of this federal bureaucracy and its procedures for enforcing its substantive oil policy. Specifically, this inquiry examines the structure of the Department of Energy (DOE) and the functioning of the oil enforcement processes within this new structure. Thus, it concentrates on the process by which DOE issues remedial orders and allows for their appeal, through both administrative agencies and the courts.

This examination yields significant procedural and structural lessons of both a general and specific nature. On a general level, substance, agency structure, and procedure are inextricably woven together. This is as it should be. In addition to being consistent with such trans-substantive process values as efficiency, accuracy, and acceptability to the parties, agency structure and procedure must be appropriate for the regulatory task at hand. In administrative law, as in art, form should be "the very shape of content."[8]

Content, however, can also be the cause of conflicting procedural and structural demands, particularly when the proposed content of an agency's rules or orders is controversial, uncertain, or both. As the saga of DOE reveals, the process of establishing an administrative framework to carry out uncertain or controversial substantive programs easily can become politicized. Agency structure and processes can become a mechanism for absorbing, thwarting, or mitigating actual and potential substantive conflict. The result can be either too much procedure in the case of a particular program or an administrative structure that is more a monument to distrust and wariness of bureaucracies than an efficient means for carrying out a preordained congressional policy.

Because some domestic oil controls will exist for the next year and a half, an examination of the Energy Department's structure and its enforcement processes within that structure yields significant lessons for the short-term future. Recommendations for improving these processes will thus be of significance not only to the numerous enforcement actions now pending within DOE,[9] but also to the new actions that continually are being brought.

More important, an understanding of the evolution of this "almost unbelievable" federal bureaucracy may guide future regulatory reform and reorganization efforts. The Department of

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[8] B. Shahn, The Shape of Content 62 (1960).

[9] As of June 30, 1979, DOE had the following enforcement actions outstanding:

Energy Organization Act (DOE Act)[10] allocated decisionmaking responsibility among a cabinet-level secretary, various executive agencies under his control,[11] and the Federal Energy Regulatory Commission (FERC), an independent agency.[12] Combining an executive agency and an independent commission under one administrative roof risks fragmenting internal policymaking and, at least with respect to enforcement procedures, duplicating administrative processes and functions. A critical examination of the rationale and workability of this type of structural arrangement is, thus, appropriate, particularly in light of proposals for further reorganization of the federal bureaucracy.[13]

Pending Administrative Enforcement Actions
of the Economic Regulatory Administration (ERA)

Issued Enforcement Documents	*Number*	*Amount*
Office of Special Counsel (OSC)		
Notices of Probable Violation	30	$ 520,847,187
Proposed Remedial Orders	19	1,745,222,829
OSC Subtotal	49	2,266,070,016
Office of Enforcement (OE)		
Notices of Probable Violation	90	$ 259,419,142
Proposed Remedial Orders	124	34,081,726
OE Subtotal	214	$ 293,498,868
DOE Total Pending Actions	263	$2,559,568,884

Letter from Lynn R. Coleman, General Counsel, DOE, to William C. Bush, Administrative Conference of the United States (Aug. 27, 1979) (on file at *Cornell Law Review*). Enforcement actions have continued to occupy DOE from the time of President Carter's address up to the last few months. *Compare* N.Y. Times, May 3, 1979, §A, at 1, col. 6 *with* En. Users Rep. (BNA) No. 332, at 9 (Dec. 20, 1979). Moreover, in response to a recommendation made by the Sporkin Task Force Report, an Office of Special Counsel was created in 1977. *See generally* 2 Economic Regulatory Administration, United States Department of Energy, Task Force on Compliance and Enforcement, Final Report at vi (repr. Mar. 1978) (Stanley Sporkin, Task Force Chairman) [hereinafter cited as *Sporkin Report*]. The sole purpose of this office is to enforce oil pricing and allocation regulations as they are applied to the 34 major oil companies. From December 1, 1977 to November 30, 1978, more than 60 proceedings were begun or pending on overcharge violations totaling in excess of $1.5 billion. *See* Status Report, Office of Special Counsel (1979) (on file at *Cornell Law Review*).

[10] 42 U.S.C. §§ 7101-7352 (Supp. I 1977).

[11] *See* text accompanying notes 99-108 *infra*.

[12] *See* text accompanying notes 94-98, 110-20 *infra*.

[13] *See, e.g., Interior Department Revamp Called for in Carter Proposal,* 37 Cong. Q. 379, 379 (1979); *Reorganization Planned for National Resources, Economic Development,* 37 Cong. Q. 33, 33-34 (1979).

Finally, the DOE experience provides lessons regarding the appropriate proceedings for administrative enforcement adjudication. Although Congress usually has not exempted compliance and enforcement proceedings from the adjudicatory requirements of the Administrative Procedure Act (APA),[14] it has consistently provided for such an exemption throughout the administration of the energy program.[15] Thus, DOE enforcement processes represent an experimental attempt to strike a balance among "accuracy, efficiency, and acceptability"[16] arguably different from that required by the APA. Proposals to amend the adjudicatory sections of the APA are now pending in Congress.[17] An examination of DOE's approach to such adjudication will guide comment on these proposed reforms.

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[14] This, of course, is not the case when rulemaking procedures are called for. Over the years Congress and the courts have added significantly to the procedural requirements of the informal rulemaking process of § 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1976). *See* Verkuil, *Judicial Review of Informal Rulemaking,* 60 VA. L. REV. 185, 187 (1974). *See generally* Hamilton, *Rulemaking on a Record by the Food and Drug Administration,* 50 TEXAS L. REV. 1132 (1972). For an excellent discussion of what the courts have been doing to § 553, see Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court,* 1978 SUP. CT. REV 345.

The rulemaking requirement of the DOE Act, 42 U.S.C. § 7101-7352 (Supp. I 1977), is an example of the well-established trend to augment the procedural requirements of § 553 on an agency-by-agency basis. The DOE Act provides more extensive rulemaking procedures than the APA. For example, a 30-day comment period is required for all rulemaking, including interpretative rules and rules granting exemptions or relieving restrictions. 42 U.S.C. § 7191(b) (Supp. I 1977). The APA exempts such rules from the 30-day notice period. 5 U.S.C. § 553(d) (1976). The DOE Act requires that before the Secretary may promulgate any rule within his jurisdiction, he must afford interested parties the opportunity *orally* to present their views and data. He may dispense with an oral presentation only if he determines that no substantial issue of law or fact is involved and that the rule, regulation, or order is unlikely to have a substantial impact on the national economy or on large numbers of individuals or businesses. 42 U.S.C. § 7191(c) (Supp. I 1977). The Conference Report makes clear that the Secretary should provide an opportunity for oral argument "in most instances." H.R. REP. No. 539, 95th Cong., 1st Sess. 82, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 925, 953.

When the Secretary determines that no oral presentation is necessary, the DOE Act requires that the rule be promulgated in accordance with the rulemaking procedures of § 553 of the APA. 42 U.S.C. § 7191(c) (Supp. I 1977). These procedures do not apply where the rule involves a military or foreign affairs function or the matter concerns agency management or personnel, public property, loans, grants, benefits, or contracts. 5 U.S.C. § 553(a) (1976). The DOE Act, however, eliminates the exemption for public property loans, grants, or contracts, leaving only the exemption for military or foreign affairs functions, and agency management or personnel matters or benefits. 42 U.S.C. § 7191(b)(3) (Supp. I 1977).

Many of the acts governing the substantive matters transferred to DOE contain their own procedural requirements, in excess of those of the APA. For the procedural provision of the Energy Policy and Conservation Act, see 42 U.S.C. § 6295(b) (1976). Section 6295(b) provides that when the Secretary proposes a rule setting energy efficiency standards for consumer products under the Act, he must allow 90 days for public comment and must wait 120 days before promulgating the rule. The DOE Act provides that when procedural safeguards prescribed by the statutes governing the transferred authorities are greater than those of the APA, the greater safeguards will apply. 42 U.S.C. § 7191(a)(1) (Supp. I 1977).

[15] *See* text accompanying notes 161-93 *infra*. The procedural history of the oil program begins with the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, *as amended by* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat.

These tasks should begin with an examination of the new administrative context surrounding the developing enforcement of oil regulation. Thus, this Article first examines the 1977 Department of Energy Organization Act, focusing on the legal relationships between the Secretary of Energy, the various executive units under his supervision and control, and the Federal Energy Regulatory Commission. Second, the Article focuses on the procedures used to enforce oil pricing regulations. From this background emerge some general conclusions on administrative procedure and structure and a number of specific recommendations for the improvement of DOE's regulatory process.

I

THE DEPARTMENT OF ENERGY

A. *An Overview*

Congress passed the Emergency Petroleum Allocation Act of 1973 (EPAA)[18] in the aftermath of an oil embargo imposed by

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743, *as amended by* Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, 87 Stat. 27. The amendments to this Act exempted the Cost of Living Council from the adjudicatory provisions of the APA. *See* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 207(a), 85 Stat. 747. These exemption provisions were incorporated by reference in the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, § 5a, 87 Stat. 633 (codified at 15 U.S.C. § 754(a) (1976)). These exemptions were continued in a different form in the DOE Act, Pub. L. No. 95-91, §§ 503, 504, 91 Stat. 590 (codified at 42 U.S.C. §§ 7193, 7194 (Supp. I 1977)).

[16] Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues,* 71 MICH. L. REV. 111, 137 (1972); *see* Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting,* 58 VA. L. REV. 585, 592-93 (1972).

[17] S. 2147, 96th Cong., 1st Sess. (1979); S. 755, 96th Cong., 1st Sess. (1979); S. 262, 96th Cong., 1st Sess. (1979).

[18] Pub. L. No. 93-159, 87 Stat. 627 (codified at 15 U.S.C. §§ 751-756 (1976)). For discussions of this Act, *see* TASK FORCE ON REFORM OF FEDERAL ENERGY ADMINISTRATION, FEDERAL ENERGY ADMINISTRATION REGULATION 9-10 (P.MacAvoy ed. 1977) [hereinafter cited as PRESIDENTIAL TASK FORCE REPORT]; Langdon, *FEA Price Controls for Crude Oil and Refined Petroleum Products,* 26 INST. OIL & GAS L. & TAX. 55 (1975); Note, *National Energy Goals and FEA's Mandatory Crude Oil Allocation Program,* 61 VA. L. REV. 903 (1975). For a discussion of the EPAA as later amended, see Richardson, *Crude Oil Pricing—Current Regulations and Practices,* 23 ROCKY MTN. MIN. L. INST. 803 (1977).

the Organization of Petroleum Exporting Countries (OPEC).[19] Congress intended this Act to minimize the adverse economic consequences of oil shortages from the embargo and the fourfold increase in the price of OPEC oil that followed the embargo.[20] To accomplish these goals, Congress gave the President broad pricing and allocation authority over crude oil, residual fuel oil and various refined petroleum products.[21]

Though the EPAA was directed at problems with long-term consequences, it was, in effect, crisis legislation. It was hastily passed[22] and granted the President only "temporary authority to deal with shortages" of crude oil, residual fuel oil, and refined products.[23] Congress never intended to provide for oil pricing and allocation controls on a long-term or permanent basis.[24]

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[19] OPEC, an intergovernmental oil producers' cartel, was formed in 1960 by Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela. It now includes Algeria, Indonesia, Abu Dhabi, Libya, Qatar, Nigeria, Ecuador, and Trinidad. OPEC controls approximately 85% of the oil in international commerce and accounts for about 50% of the total amount of oil consumed in the United States. *See* M. Willrich, Energy and World Politics 6-8 (1975); The Energy Project at the Harvard Business School, Energy Future 223-24, 232 (R. Stobaugh & D. Yergin eds. 1979). For a history of the function and impact of the OPEC cartel, see Z. Mikdashi, The Community of Oil Exporting Countries (1972); Lenczowski, *The Oil-Producing Countries*, in The Oil Crisis 59 (R. Vernon ed. 1976); Mikdashi, *The OPEC Process*, in The Oil Crisis 203 (R. Vernon ed. 1976). For an analysis of the relationship between OPEC and the large oil companies, see J. Blair, The Control of Oil 276-93 (1976).

[20] In addition to curbing the inflationary impact of the OPEC price increase, Congress sought, through the EPAA, to preserve competition within the petroleum industry. Though major oil companies produced and refined their own crude oil, most independent refineries depended primarily on foreign oil supplies and the domestic "spot market." Note, *supra* note 18, at 904. Congress feared that the independents' reliance on higher priced foreign oil could drive them out of the market. *See id.* at 905, 909. One objective of allocation and price regulation is the "preservation of an economically sound and competitive petroleum industry." 15 U.S.C. § 753(b)(1)(D) (1976).

[21] 15 U.S.C. § 753(a) (1976).

[22] S. 1570, 93d Cong., 1st Sess. (1973), was introduced on April 13, 1973. 119 Cong. Rec. 12314 (1973). It was reported from committee on May 17 (S. Rep. No. 159, 93d Cong., 1st Sess. 1 (1973)) and passed on June 5 (119 Cong. Rec. 18064 (1973)). The House version, H.R. 9681, 93d Cong., 1st Sess. (1973), was introduced on July 30, 1973. 119 Cong. Rec. 26725 (1973). It was amended in committee and reported to the full House on September 29. H.R. Rep. No. 531, 93d Cong., 1st Sess. 1, *reprinted in* [1973] U.S. Code Cong. & Ad. News 2582, 2582. The House approved the measure on October 17. 119 Cong. Rec. 34454-78 (1973). S. 1570 then became H.R. 9681 (*id.* at 34478-79), the conference report was dated November 10 (H.R. Rep. No. 628, 93d Cong., 1st Sess. (1973)), and the bill became law on November 27, 1973 (Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (codified at 15 U.S.C. §§ 751-56 (1976))).

[23] 15 U.S.C. § 751(b) (1976).

[24] The Act's original termination date was later repealed. *See* Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, § 4(g)(1), 87 Stat. 632, *repealed by* Energy Policy and Conservation Act, Pub. L. No. 94-163, § 401(b)(1), 89 Stat. 946 (1975).

Congress also viewed the administrative machinery necessary to carry out this program as temporary. In 1974, Congress created the Federal Energy Administration (FEA), a temporary[25] executive agency whose primary responsibility[26] was to implement the EPAA.[27] Congress later expanded the substantive powers conferred by the EPAA,[28] and extended the life of FEA.[29] With the passage of the DOE Act in 1977,[30] most pricing responsibilities of FEA were delegated to the Economic Regulatory Administration (ERA),[31] and that agency became a permanent part of our energy program.[32] The DOE Act thus institutionalized much of the administrative machinery of the energy crisis.[33]

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[25] Long before federal sunset legislation became common Congress included a provision abolishing FEA on June 30, 1976. Federal Energy Administration Act of 1974, Pub. L. No. 93-275, § 30, 88 Stat. 115.

[26] *See generally* H.R. REP. No. 748, 93d Cong., 2d Sess. 2-4 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2939, 2940-41.

[27] Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 96 (codified at 15 U.S.C. §§ 761-786 (1976)).

[28] In the course of this expansion, Congress amended the EPAA twice. The first amendment came with the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871.

> [This 1975 amendment] attempted to provide revisions of the EPAA and additional legislation, forming the basis for a national energy policy. The EPCA established a comprehensive national energy policy to accomplish the following goals:
>
> 1. maximize domestic production of energy and provide for strategic storage reserves of crude oil, residual fuel oil and refined petroleum products;
> 2. minimize the impact of disruptions in energy supplies by providing for emergency standing measures;
> 3. provide for domestic crude oil prices that will encourage domestic production in a manner consistent with economic recovery; and
> 4. reduce domestic energy consumption through the operation of specific voluntary and mandatory energy conservation programs.
>
> In the short term, the EPCA was designed to reduce the vulnerability of the domestic economy to increases in import prices, and to insure that available supplies would be distributed equitably in the event of a disruption in petroleum imports. For the long run, the EPCA was intended to decrease dependence upon foreign imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford.

SPORKIN REPORT, *supra* note 9, app., at A-17 to -18. Pursuant to this Act, President Carter now seeks to phase out price controls completely. *See* note 2 *supra*.

In 1976 Congress amended the Act again by passing the Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976). "In addition to amending various provisions of the FEA Act and extending it for an additional 18 month period, [this Act] established a broad range of energy conservation measures and provided for the enhancement of domestic crude oil production." SPORKIN REPORT, *supra* note 9, app., at A-20.

[29] Act of June 30, 1976, Pub. L. No. 94-332, 90 Stat. 784. The first expiration date was June 30, 1976. Federal Energy Administration Act of 1974, Pub. L. No. 93-275, § 30, 88 Stat. 115. Although the Act in 1976 set July 30, 1976 as the next expiration date, it was later extended to December 31, 1977. Federal Energy Administration Act Amendments of 1976, Pub. L. No. 94-385, §112, 90 Stat. 1132.

[30] Pub. L. No. 95-91, 91 Stat. 565 (codified primarily at 42 U.S.C. §§ 7101-7352 (Supp. I 1977)).

Chance as well as design may have helped forge this long chain of legislation that culminated in the DOE Act. Though Presidents Nixon and Ford both proposed somewhat similar reorganizations,[34] President Carter's plan to establish a new energy department was superbly timed. The winter of 1977 was one of the harshest in recent years,[35] and it perhaps crystallized the growing consensus that a serious "energy problem" existed.[36] President Carter capitalized on this growing perception and convinced Congress that establishing a centralized energy department was an important first step in addressing this problem in a comprehensive manner.

The support for some federal action was nearly unanimous.[37] But disagreements over the underlying causes of the "energy problem" as well as a blurring of causes with effects undermined the chances of forming any kind of general consensus over the appropriate substantive responses.[38] For example, those who saw

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[31] *See* notes 106-07 and accompanying text *infra*.

[32] *See generally* 42 U.S.C. § 7136 (Supp. I 1977).

[33] "A BILL To establish a Department of Energy in the executive branch by the reorganization of energy functions within the Federal Government in order to secure effective management to assure a coordinated national energy policy, and for other purposes." *Department of Energy Organization Act: Hearings on S. 826 and S. 591 Before Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 4 (1977). The bill was introduced that day in the Senate as S. 826, 95th Cong., 1st Sess., 123 CONG. REC. 5666 (1977), by Senator Ribicoff (123 CONG. REC. 5666 (1977)), and in the House of Representatives the next day as H.R. 6804, 95th Cong., 1st Sess. (1977), by Rep. Brooks. *Id.* at 5885.

[34] President Nixon first proposed establishing a Department of Energy and Natural Resources in his April 18, 1973, message to Congress: "I shall propose legislation to establish a Department of Energy and Natural Resources (DENR) building on the legislation I submitted in 1971, with heightened emphasis on energy programs." Special Message to the Congress on Energy Policy, 1973 PUB. PAPERS 302, 318. The bill submitted took form as S. 2135, 93d Cong., 1st Sess. (1973). 119 CONG. REC. 22889 (1973) (remarks of Sen. Jackson). President Ford also submitted a detailed plan for reorganizing the energy bureaucracy into a new Department of Energy. President Ford submitted his plan on January 11, 1977, just before he left office. *Touchy Policy Issues Complicate Carter Efforts at Energy Reorganization*, 35 CONG. Q. 165, 166-67 (1977).

[35] *See Now, the Gas Crisis*, NEWSWEEK, Feb. 7, 1977, at 14; *The Big Freeze*, TIME, Jan. 31, 1977, at 22.

[36] Just prior to the DOE Act, Congress passed the Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, §§ 1-14, 91 Stat. 4. This Act gave the Federal Power Commission (FPC) the authority to allocate natural gas supplies to parts of the country in greatest need. On the heels of this Act, the administration proposed its version of the DOE Act.

[37] Energy reorganization was a major part of presidential candidate Carter's platform in 1976. Popular opinion held that the Nixon and Ford administrations had followed a stopgap, haphazard approach to energy policy. Congress was eager to respond, as evidenced by bipartisan sponsorship of the Carter bill in both the Senate and the House.

Statements and debate over the bill revealed a shared assumption that energy reorganization was an urgent priority. Republican Senator Javits asserted that he "co-sponsored this important measure to help to emphasize the bipartisan nature of this undertaking and to demonstrate to the President that support for a Department of Energy has a broad political base." 123 CONG. REC. 5671 (1977). Republican Representative John B. Anderson stated that:

> As one who has been closely tied to energy policy through by [*sic*] 13 years on the Joint Committee on Atomic Energy and as one who has for years recognized the real hazards of proceeding without a sense of direction, it has been particularly frustrating the last 2 years as bureaucratic confusion, political confrontation, and technological puritanism have inhibited efforts to come to grips with our growing energy shortfall. This past winter has been a shock to our system economically, politically, and technically and it serves as fair warning that things are not going to get better by themselves. The executive branch and the Congress must forge a new alliance in order to sift through the multitude of options for energy conservation, energy production, and environmental protection.

Id. at 6239. Republican Senator Heinz remarked that:

> Another factor in our failure to develop a responsible energy policy over the past 4 years has been the constant partisan wrangling on policy between Congress and the administration. I am pleased to join in sponsoring Mr. Carter's reorganization plan today because I believe that our energy policy, like our foreign policy, should be pursued on a bipartisan basis without regard to short-term political advantage. The issue is far too important for that.

Id. at 5672.

[38] The phrase "energy crisis" is used in a variety of contexts and conveys a variety of meanings within those contexts. *See* Aman, *The Energy Crisis: A Few Perspectives*, 5 CORNELL L.F. 11 (June 1978). Perhaps the phrase most commonly refers to an overall shortage of energy resources, particularly natural gas and oil. *See, e.g.*, 123 CONG. REC. H5,319 (daily ed. June 2, 1977) (remarks of Rep. Allen).

Quite apart from agreeing about the existence of a shortage, there is little agreement about the reasons for the shortage.

For remarks by legislators during the debate over the DOE Act expressing diverse opinions, see 123 CONG. REC. H5,892-93 (daily ed. June 3, 1977) (remarks of Rep. Findley); *id.* H5,274-75 (daily ed. June 2, 1977) (remarks of Rep. Rudd); *id.* S7,941 (daily ed. May 18, 1977) (remarks of Sen. Helms); 123 CONG. REC. 10907-09 (1977) (remarks of Sen. Kennedy).

Many persons believe that excessive government regulation caused our energy problems. *See, e.g.*, E. MITCHELL, U.S. ENERGY POLICY: A PRIMER 71-73 (1974); 123 CONG. REC. 6124-25 (1977) (remarks of Sen. Tower); *cf. id* 6123 (1977) (remarks of Sen. Ribicoff) (before DOE, agency fragmentation contributed to energy problems). Artificially low energy prices have not provided the incentives necessary for discovery of new energy sources. At the same time, these low prices have created more demand than would otherwise have existed if prices had been allowed to rise gradually. In an unregulated market, consumers would receive accurate pricing signals, and producers would have greater incentives to take the necessary risks and bear the added costs required to find new energy supplies. Thus, a free-market approach might increase energy supplies and eliminate the price-related shortages we now face. *See* E. MITCHELL, *supra*, at 73.

the energy crisis primarily in income redistribution terms and doubted that charging consumers higher prices would result in

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The free-market approach implies that consumers may continue to *use* energy as they please, that is, as much as they can afford. Other analysts, however, focus on our *uses* of energy as the underlying cause of the energy crisis. As one critic has put it:

> Living in the most affluent society in history, Americans took large amounts of the resources of the globe and became the best clothed, housed, fed, transported, and entertained people in the world.
>
> It was, however, never enough. The American people were insatiable. They demanded more of everything; taller buildings; extravagant space programs; more powerful, luxurious autos; weed-free lawns; second houses; boats—everything. And this spiral still didn't bring contentment.

S. UDALL, C. CONCONI & D. OSTERHOUT, THE ENERGY BALLOON 22-23 (1974). Although artificially low prices may have facilitated our materialistic excesses, such criticism suggests that we are the real culprits because we have chosen to consume whatever energy is available. The energy crisis thus raises an entirely different set of issues and presents an opportunity to reexamine our way of life and, perhaps, change it substantially.

Besides tracing the underlying causes of the "energy crisis," various commentators have focused on its socio-economic effects. In particular, they have stressed the economic impact of shortages and high prices on poor and middle class energy users. *See, e.g.*, E. GRIER, COLDER . . . DARKER: THE ENERGY CRISIS AND LOW-INCOME AMERICANS (1977); Henderson, *Energy Policy and Socioeconomic Growth in Low-Income Communities*, 8 REV. BLACK POLITICAL ECON. 87 (Fall 1977); Schexnider, *Blacks, Cities, and the Energy Crisis*, 10 URB. AFF. Q. 5 (1974). Many assume we can have more energy if we are willing to pay the market-clearing price. This, however, entails a transfer of wealth from the consumer to the utility or oil company. Such a result would burden consumers, particularly those with fixed incomes. Viewing the energy crisis in terms of income redistribution, many persons see the chief concern of energy policy as the plight of the poor—rising prices versus fixed incomes. Income redistribution may be the most politically troublesome aspect of the "energy problem." Thus, not surprisingly, the primary purpose of much energy legislation is to soften the economic impact of high priced energy upon these vulnerable segments of the consuming public. *See, e.g.*, H.R. 3919, 96th Cong., 1st Sess. (1979) (windfall profits tax).

The relationship between energy resources development and the environment further complicates the "energy problem." *See generally* ENERGY AND THE ENVIRONMENT: A RISK BENEFIT APPROACH (H. Ashley, R. Rudman & C. Whipple eds. 1976). Coal is an abundant resource and nuclear power offers a long-term source of supply, but increased reliance on these energy sources means a trade-off between environmental values and energy self-sufficiency. *See generally* HOUSE SUBCOMM. ON THE ENVIRONMENT AND THE ATMOSPHERE OF THE COMM. ON SCIENCE AND TECHNOLOGY, 95TH CONG., 2D SESS., RESEARCH AND DEVELOPMENT NEEDS TO MERGE ENVIRONMENTAL AND ENERGY OBJECTIVES (Comm. Print 1978); SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 93D CONG., 1ST SESS., COAL SURFACE MINING AND RECLAMATION: AN ENVIRONMENTAL AND ECONOMIC ASSESSMENT OF ALTERNATIVES (Comm. Print 1973); *Hearings on H.R. 4047, H.R. 4295, and H.R. 7976 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. (1969). *See also* Federal Mine Safety and Health Act of 1977 and Amendments of 1977, 30 U.S.C. §§ 801-825 (Supp. I 1977)); Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7401-7626 (Supp. I 1977). For discussions of safety aspects of nuclear energy, see B. COMMONER, THE POVERTY OF POWER 82-120 (1976); AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, IS NUCLEAR POWER SAFE? (M. Laird moderator 1975); Bodansky & Schmidt, *Safety Aspects of Nuclear Energy*, in THE NUCLEAR POWER CONTROVERSY 8 (A. Murphy ed. 1976); Kistiakowsky, *Nuclear Power: How Much Is Too Much?*, in THE NUCLEAR POWER CONTROVERSY 157 (A. Murphy ed. 1976). Yet Congress, in setting up DOE, failed to deal with the environmental aspects of energy choosing to leave control of the environment increased supplies were less likely to support the deregulation plans urged by others. Such fundamental differences in the perception of the problem involved delayed the legislative process and confused its ultimate substantive product.[39] Moreover, this ambivalence over substance had a significant effect on the administrative structure Congress designed to combat the energy crisis.

B. *The Administration's Bill—The Beginnings of the Department of Energy Organization Act of 1977*

The introduction of the legislation that ultimately resulted in the Department of Energy Organization Act of 1977 sparked a congressional battle over the substance of a rational energy program.[40] Yet the initial bill contained no indication of what new substantive policies the proposed energy department would implement.[41] The Carter Administration reasoned that centralized

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with other agencies. *See* Byse, *The Department of Energy Organization Act: Structure and Procedure,* 30 AD. L. REV. 193, 194-98 (1978).

Finally the phrase "energy crisis" connotes enormous international problems. The Arab embargo of 1973 and the Iranian cut-off of 1979 indicate our dependence on foreign powers that may prove hostile to our long run interests. For an analysis of the effects on the West of OPEC's various decisions, see Pindyck, *OPEC's Threat to the West,* FOREIGN POL'Y, at 36, *passim* (No. 30 Spring 1978); *see also* Levy, *The Years That the Locust Hath Eaten: Oil Policy and OPEC Development Prospects,* 57 FOREIGN AFF. 287, 287-305 (Winter 1978-79) (OPEC members' interests may diverge from those of the United States). At stake is our national security. The attempt to bolster our security raises important questions about our ability to and the wisdom of achieving energy self-sufficiency in an increasingly interdependent world economy.

The National Energy Act, Congress' response to the "energy problem," consists of five separate major pieces of legislation affecting energy policy. They are: (1) the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350; (2) the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117; (3) the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 42 Stat. 3289; (4) the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (1978); (5) the Energy Tax Act, Pub. L. No. 95-618, 92 Stat. 3174 (1978).

[39] *See, e.g.,* The Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350. This Act was one of five parts of the National Energy Act and the legislation around which most of the controversy was centered. The disagreement in Congress over whether federal price controls on natural gas should be completely eliminated, phased out on a gradual basis, or retained delayed passage of the National Energy Act for nearly 19 months. The Carter energy plan was presented to Congress in April 1977. It was rejected by the Senate, which approved ending federal price controls for new gas on October 4, 1977. In conference, a compromise was struck which allows for gradual phasing out of all controls by 1985. The Senate passed the conference report on October 9, 1978, the House passed it six days later, and the plan became law November 9, 1978.

[40] *See* notes 37-52 and accompanying text *supra*.

[41] The Administration presented its bill on March 1, 1977, less than six weeks after President Carter took office. The proposed energy *policy* to accompany the new executive

administration of any energy program, regardless of its substantive bent, was far superior to existing fragmented policymaking machinery.[42] To increase centralization, the Administration's bill

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department was not scheduled to be outlined until late April. *See* Department of Energy: Remarks Outlining Proposed Legislation To Create the Department, [1977] 1 **Pub. Papers** 257.

This caused much irritation and some opposition in Congress. *See* notes 89-90 and accompanying text *infra*. Suspicions that the President would use the DOE Act to preempt congressional input into energy policy formulation tempered the desire to jump on the reorganization bandwagon. Thus, many legislators felt that reorganization prior to substantive policy placed the "cart before the horse." *See, e.g.*, 123 Cong. Rec. H5,272 (daily ed. June 2, 1977) (remarks by Rep. Armstrong); *id.* H5,391-92 (daily ed. June 3, 1977) (remarks by Rep. Treen); *id.* S13,287 (daily ed. Aug. 2, 1977) (remarks by Sen. Stevens). Senator Roth very aptly asked:

> Is natural gas going to be deregulated? If so, that affects the transfer of power from the Federal Power Commission to the new Department. Is solar energy going to be given a high priority in the new Administration's plans? If so, that may determine whether one of the eight assistant secretaries should be specifically designated as responsible for solar energy. Similar questions are raised on every page of this bill. And those are the kinds of questions which I think should be answered before an organization is cast in concrete.
>
> I also hasten to warn that if this bill is based on a hidden agenda, not one which is merely unknown, then this should be revealed to the Congress. When the administration energy proposals are revealed in another month or two it will be clear to everybody concerned whether this reorganization bill was drawn with policy objectives clearly in mind.

Department of Energy Organization Act: Hearings on S. 826 and S. 591 Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. 106 (1977) [hereinafter cited as *Senate Hearings*]. Similar views were also voiced in the House: "Until we finally really know what the President is going to do . . . it is very hard to understand how you can really organize and create a department to carry those policies out." *Department of Energy Organization Act: Hearings on H.R. 4263 Before the House Comm. on Government Operations*, 95th Cong., 1st Sess. 210-11 (1977) (statement of Rep. Wydler).

The public hearings held by both the Senate and the House elicited similar concerns from witnesses: "We . . . support . . . government [energy] reorganization . . . . The main uncertainty involves the lack of an enunciated energy policy for the Department of Energy . . . ." *Id.* at 401 (statement of Jeffrey Knight, Legislative Director, Friends of the Earth).

[42] We need a new organizational entity which has the scope of authorities to make trade-offs in an age of fuel scarcity; which has the public support to pursue a vigorous conservation policy; which has the capability to collect and analyze meaningful energy data, to conduct research and development which relates to policy priorities, and to regulate responsibly and equitably. And we need to insure that this organization does not lose sight of the important considerations that must be intimately involved with our energy problems: Protection of the environment; consultation with States and localities; recognition of the vital role which energy matters will play in foreign affairs; and protection of the consuming public's interest.

> There will likely be differences about specific policy objectives in the future. But I believe there should be no dispute about the need for establishing an organizational base within which these policies can be carried out.
>
> . . . .
>
> *Reorganization of the Federal energy establishment to deal more effectively with our energy problems is an idea whose time has come. We can no longer live with the frag-*

sought to abolish the Federal Power Commission (FPC), FEA, and the Energy Research and Development Administration (ERDA).[43]

> *mentation, the duplication, the overlapping jurisdictions, and the conflicting mandates evident in the current organization for dealing with energy problems.*
>
> . . . .
>
> No agency anywhere in the Federal Government has the broad scope of authorities to deal with our energy problems in a comprehensive manner.
>
> . . . .
>
> In the area of national energy policy, for the first time, we will have the responsibility for the formulation of energy policy vested in one Government institution. Assisted by an Under Secretary for Policy and Evaluation, the Secretary will be able to speak authoritatively for the Executive branch on those national energy policies needed to put energy supply and demand back into balance.
>
> By establishing the Department, we will be assured of having one Government body with sufficient scope and authority to effectively oversee the development of national energy policy. Therefore, the need no longer will exist for a formal, statutory Energy Resources Council, and this legislation will abolish it. However, energy-related issues will obviously continue to cut across departmental lines, and a less formal interdepartmental coordinating body will be established by Executive order, with the Energy Secretary as chairman, to address these concerns.

Senate Hearings, supra note 41, at 121-24 (testimony of James R. Schlesinger, Assistant to the President) (emphasis added).

> In general, duplication, overlapping jurisdiction, fragmentation of responsibility, and conflicting mandates have hampered the government's ability to formulate and implement a coherent, long-range national energy policy.
>
> Foremost among those issues needing organizational resolution is that of energy policy formulation and decision-making. Currently, the central mechanism for directing policy development and coordination, as well as for monitoring and evaluating program implementation, is the statutory Energy Resources Council. The ERC did not and could not, with its members' other duties, devote itself as a body to the day-to-day problems and issues which energy policy formulation demands.
>
> The absence of a single agency responsible for policy development has resulted too frequently in inconsistent and uncoordinated short and long-range planning assumptions and policies.
>
> Energy policy can neither be effectively developed nor implemented without the benefit of a single entity capable of providing coherence to all of our energy-related programs and of melding these efforts together into a planned and concerted effort to achieve national energy objectives.
>
> With the Department of Energy, responsibility for the formulation of energy policy will be directed to the Secretary of Energy. With the support of a consolidated organization with the authority and capability to manage Federal actions needed to implement energy policy, this legislation will achieve the singular task of locating clearly the executive's responsibility for the development and execution of energy policy objectives.

Id. at 127-28 (statement of John F. O'Leary, Administrator, FEA). *See id.* at 164 (testimony of Richard L. Dunham, Chairman, FPC); Department of Energy: Remarks Outlining Proposed Legislation To Create the Department, [1977] 1 PUB. PAPERS 257; Department of Energy: Message to the Congress Transmitting Proposed Legislation, [1977] 1 PUB. PAPERS 257, 257-59.

[43] S. 826, 95th Cong., 1st Sess. § 301, *Senate Hearings, supra* note 41, at 4-5 (1977).

The bill proposed the creation of a cabinet level office of Secretary of Energy,[44] various executive agencies under the Secretary's supervision or control,[45] and a Board of Hearings and Appeals.[46] The powers previously exercised by the agencies to be abolished by this legislation were largely retained; however, the proposed bill allocated these powers primarily among new executive administrative units.[47]

Perhaps the most significant aspect of the Administration's bill was its attempt to allocate primary energy policymaking power to an executive agency rather than to an independent regulatory commission. From the Carter Administration's point of view, this had a number of advantages, including greater presidential control over energy policy.[48] Moreover, increased centralization in an executive agency would result in greater accountability to the electorate: policy would be made primarily by a cabinet level official with closer ties to the popularly-elected President.

Executive policymaking signalled a second significant change: a move to more effective use of the rulemaking process in formulating energy policy.[49] Proponents of the bill argued that ad-

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[44] *Id.* §§ 201, 301, *Senate Hearings, supra* note 41, at 5, 7-8.

[45] *Id.* §§ 204-205, *Senate Hearings, supra* note 41, at 6-7.

[46] *Id.* § 401, *Senate Hearings, supra* note 41, at 15-17.

[47] The Act as passed by Congress, however, essentially allocated powers within the Department between the Secretary of Energy and an independent adjudicatory agency (FERC). *See* note 93 and accompanying text *infra*. The Act, however, provides FERC with considerably more power than the Administration had initially planned to delegate to the Board of Hearings and Appeals. *See* note 59 and accompanying text *infra*.

[48] The White House Fact Sheet on Energy Reorganization Legislation 8, 10-11 (Mar. 1, 1977) (on file at *Cornell Law Review*) [hereinafter cited as White House Fact Sheet].

[49] The Administration hoped to accomplish this not only by substituting rulemaking for adjudication, but also by eliminating the bifurcation of oil and natural gas regulation between the FEA and FPC. The gradual shift to rulemaking therefore had substantive as well as procedural consequences. Though not stressed by the Administration, expedited and coordinated oil-gas regulation and increased use of rulemaking procedures lay at the core of the reorganization plan.

> The FEA has regulatory functions that have been exercised since 1974, and has not performed those functions on the basis of an on-the-record formal adjudicatory procedure.
>
> That covers all petroleum products.
>
> By contrast, natural gas, which has been regulated since 1938 by the Federal Power Commission, has had considerable experience in dealing with formal on-the-record adjudicatory procedures.
>
> We do not see the reason for discrepancy in the treatment of petroleum on the one hand, and natural gas on the other, and we think that we should move

judicatory hearings had been used far too extensively in making

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> toward administration of these fuel sources in the same manner, preferably within the same agency.
>
> In addition to that, Mr. Chairman, on-the-record hearings by the Federal Power Commission have been most time consuming.
>
> By placing these matters in this same agency, we can trade off more effectively between informal rulemaking authorities, and formal adjudicatory proceedings on-the-record, and it would be our intention to do so.

Senate Hearings, supra note 41, at 131 (remarks of James R. Schlesinger, Assistant to the President). Another witness stated that:

> [I]n the major energy pricing decisions of the Federal Power Commission, I have not found the legal maxims under which we have been forced to operate particularly useful in making the hard choices presented to us.
>
> In addition, our current standards of judicial review certainly do not further the certainty which I believe to be so important in energy decisionmaking, and to which the President alluded in his recent press conference remarks.
>
> . . . .
>
> Therefore, although I fully support the idea of a single decisionmaker on major energy policy and pricing decisions, we must realize that the bill before us does nothing to eliminate the time lag of judicially created uncertainty.
>
> It has always puzzled me that petroleum product price and allocation responsibility resided with FEA, while virtually identical electric power and natural gas functions remained with FPC.
>
> In just 1½ years that I have served as Chairman of the Commission, large amounts of time and funds have been expended to attempt to reconcile the differences between FEA and FPC regulations and procedures, and to coordinate policies between the two agencies.
>
> These efforts were only partially successful, but the burden in terms of cost, delay, and frequent inconsistency is one the Nation should not have to bear, and one it would not have to bear if the reorganization proposed by the President is accomplished.
>
> There is, of course, a direct economic relationship between licensing, price, and supply of natural gas, electricity, petroleum—indeed, all sources of energy—and it simply makes sense to have all governmental actions related to these functions coordinated within a single agency.

Id. at 166-67 (testimony of Richard L. Dunham, Chairman, FPC). However, some expressed reservations that the transition to coordination of oil and gas regulation would prove complicated and messy because of the historical split between the two:

> Now, what is good about the way FPC functions is that the same agency decides all aspects of natural gas and electric power cases which come before it, utilizing a single, integrated staff.
>
> . . . .
>
> Under the provisions of the bill, it is impossible to say how the cases would be handled. Indeed, it is impossible to know how the 15,000 cases which are already docketed should be handled. It would be an appalling task to go through the files and attempt to determine which files should be assigned to the Administrator, which to the Hearings and Appeals Board, and perhaps which to the Secretary or to other agencies.
>
> If assignment is to be made on the basis of whether the case is expected to go to hearing, what happens when there is a settlement? Must the file be moved from the Board back to the Administrator?
>
> If so, what are the risks and the frustration if a new staff must begin examination of the transactions de novo.

essentially policy decisions better handled by rulemaking.[50] They claimed that such over-judicialization of energy policymaking resulted in unnecessary delay and cost as well as a decisionmaking

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> Another good thing about the Federal Power Commissin [*sic*] is that there is a close working relationship between the Commission and staff to the extent permissible without violating ex parte considerations.
>
> This is the essence of the advantage of the regulatory agency over the courts, in deciding technical questions involving complex situations and numerous issues.
>
> Now, if there is to be a division of function between the Administrator and the Board, each will need an expert staff. It is difficult enough to assemble one competent group of staff experts. I do not visualize the feasibility of a dual staff arrangement. It would be hard to recruit two staffs or to establish conditions which permitted them to function in tandem.
>
> There would be infinite possibility for delay and confusion if matters were transferred from one staff to another.

Id. at 206 (testimony of Joseph C. Swidler, former Chairman, FPC). *See also id.* at 166 (testimony of Richard L. Dunham, Chairman, FPC).

[50] For example, James Schlesinger testified that:

> We would hope over a period of years to move increasingly toward informal rulemaking and decisionmaking procedures, and to reduce the amount of formal on-the-record adjudicatory proceedings; however, in individual cases which determine the rights of individuals we shall always expect to retain adjudicatory proceedings of sufficient formality to assure due process.
>
> But I think more and more can be moved by these more flexible methods, and that would be our intention.

Id. at 132. *See also id.* at 125. Groups at both ends of the political spectrum tempered their criticisms of FPC by cautious appreciation of the due process protections afforded by formal adjudication, and suspicion that undue emphasis on expedition of cases might, in fact, be more harmful than helpful. As former FPC Chairman Joseph C. Swidler observed:

> [T]he FPC is probably unique in the very large number of so-called big cases it handles proceedings which involved very large investments, large revenues, numerous parties, intervenors, distributors, producers, and an enormous consumer interest.
>
> Hundreds of millions of dollars are at stake here. I do not say that all of the proceedings before the FPC are handled with the efficiency and dispatch that we ought to expect, but I do say that it proceeds in a very careful way that all interests are taken into account, that its procedures have been highly developed over a long period of time, and that they are generally satisfactory to the industries and to the intervening parties.

Id. at 204-05. Lee C. White, another former FPC Chairman, echoed Swidler's analysis and noted that competing policies favored different groups, thus making energy reorganization a politically sensitive issue:

> Again, as Mr. Swidler said, I think there are a number of areas where rulemaking and simplified procedures can be used. You cannot kid yourself. One guy's due process is another fellow's inability to get something done.
>
> Here we are asking the administration to move forward. The new administration is seizing the responsibility. As a lawyer, sometimes I know that time is my client's friend and sometimes his enemy, and so it is the age-old question of how do you cut through and make sure the due process is really not undue process, or unduly burdensome, or lengthy.

Id. at 208.

process incapable of responding quickly to future energy emergencies.[51]

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[51]
> We need to construct an effective Government organization that can meet the challenge and propose a rational solution. In my opinion, such an organization can only be effective if we confer upon the Secretary of Energy the authority to establish overall policy direction on energy matters, the right to manage resources, to coordinate the manner and the ability to meet energy demands, including recurrent crises, in an expeditious and effective manner.

123 CONG. REC. H5,296 (daily ed. June 2, 1977) (remarks of Rep. Brooks).

But the old FPC structure and system had its defenders. Rising to the defense on this point was FPC Administrative Law Judge Curtis L. Wagner, Jr., in an exchange with Senator Ribicoff:

> Chairman RIBICOFF. This is the trouble. If you are talking about an emergency situation where there is an actual allocation for an emergency, and if it takes 3 or 4 months to make a decision, in 3 or 4 months the emergency is over. How do you solve that?
>
> Judge WAGNER. In an emergency situation, we hold an emergency hearing. We waive briefs. We have on-the-record arguments, and we issue our decision the next day if necessary. We quite often do this.
>
> I had an emergency situation this past month in the case of *Philadelphia Gasworks v. Transcontinental Gas Pipeline Co.* The case was set for hearing by the Commission on Friday. I convened hearings on Monday morning at 9. I concluded the hearings on Thursday afternoon and immediately certified the record and recommended action to the Commission which issued a final order the next day.
>
> The case was handled in less than a week.
>
> Chairman RIBICOFF. All right.

Senate Hearings, supra note 41, at 784-85.

Senator Metcalf, on the other hand, challenged the emergency notion itself, thereby reframing the argument over location and efficiency of government energy action:

> In the name of emergency—one that is yet to be proved to this Senator—we are being asked, in essence, to delegate all Federal powers over the price and allocation of energy supplies to the head of a new department, subject to the direct control of the President, without adequate standards, and without sufficient safeguards of due process, or administrative protection against arbitrary abuse of discretion.
>
> . . . .
>
> In time of war or other imminent and endangering threats to our security, such aggregation of power in the President may be justified, but today it is very questionable and must be looked at with much more than the peripheral inspection we have thus far given it in the Senate.

123 CONG. REC. S7,956-57 (daily ed. May 18, 1977).

Senator Percy, in support of increased use of rulemaking, remarked that:

> If there is any one thing we know in any area where there is rulemaking or decisionmaking, it is that we really need decisions made as swiftly and as expeditiously as possible. It is indecision that causes so many mistakes in judgment and so much condemnation of Government, because of our inability to get off the dime and make up our minds.
>
> It is the decision of the committee, then, that the proposal that we have made best handles this sensitive and difficult issue. By emphasizing rulemaking, it does attempt to speed up economic regulatory decisions on energy resources.

Id. S7,918.

1. *Board of Hearings and Appeals*

Even though most of the policymaking power was to reside in the executive, the proposed Department of Energy Organization Act also provided for the creation of a Board of Hearings and Appeals. This was to have been an independent regulatory commission with the sole function of rendering adjudicatory decisions in certain cases.[52] In essence the Board was to have been a specialized in-house energy court.

In functioning as the agency's own judicial branch the Board was to have been completely independent of the Secretary. Its members—a chairman and two others—were "not [to] be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Department."[53] Members were to have been appointed to four-year terms of office and could be removed by the President "only for inefficiency, neglect of duty, or malfeasance in office."[54] Action by the Board was to have been "final agency action"[55] and thus subject to judicial review,[56] but board decisions were not to have been subject to any further review within the Department of Energy.[57]

Under the Administration's proposal, the Board would have had no power to initiate any actions nor could it define its own jurisdiction.[58] The proposed bill would have limited the Board by granting it jurisdiction "to hear and determine matters arising under any function vested in or delegated to the Secretary involving . . . any agency determination required by law to be made *on the record* after opportunity for an agency hearing."[59] By use of the magic words "on the record," proponents of the bill clearly intended the Board to be involved only if adjudication or formal rulemaking were statutorily required.[60] If there was any doubt as to whether a statute required adjudication or formal rulemaking, the Board would not be empowered to decide such a question.

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[52] S. 826, 95th Cong., 1st Sess. §§ 401, 402, *Senate Hearings, supra* note 41, at 15-18 (1977).

[53] *Id.* § 401(d), *Senate Hearings, supra* note 41, at 16.

[54] *Id.* § 401(b), *Senate Hearings, supra* note 41, at 16.

[55] *Id.* § 401(e), *Senate Hearings, supra* note 41, at 16-17.

[56] *Id.* § 501(a), *Senate Hearings, supra* note 41, at 18.

[57] *Id.* § 401(e), *Senate Hearings, supra* note 41, at 16.

[58] *Id.* § 401 (a)(2), *Senate Hearings, supra* note 41, at 15.

[59] *Id.* § 401(a)(2)(A)(i), *Senate Hearings, supra* note 41, at 15 (emphasis added).

[60] Concerns over the procedural safeguards for those proceedings that were not statutorily required to be "on the record" prompted opposition to this provision.

Rather, the Secretary would decide whether the Board had jurisdiction to hear the case.[61] In addition, when adjudicatory proce-

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> Another apparent problem with the bill seems to be the reduction of due process protections which have always been associated with ratemaking under the EPA and NGA. Any person familiar with the ratemaking process recognizes that ratemaking, regardless of how classified in the lawyers' lexicon, is an adjudicatory process and that cross-examination is the consumer's best and sometimes only ally. However, under the bill, specifically Sec. 401(a)(2) . . . , the Board would have mandatory jurisdiction only over those agency determinations "required by law to be made on the record after opportunity for an agency hearing," and since the ratemaking provisions of the FPC (Sections 205 and 206) and the NGA (Sections 4 and 5) do not specifically require "on the record" hearings, the bill as written opens the door for the Secretary (through the Administrator of ERA) to set rates by rulemaking. Thus under the bill, there exists the very real possibility that the long-established practice of settling rates for public utilities and natural gas companies only after full adjudicatory hearings will be abolished in favor of settling rates by informal rulemaking procedures.
>
> I have not seen any viable reason yet advanced for shifting the certificate and ratemaking functions of the FPC to the DOE. The shift of such functions from an independent regulatory agency to an executive branch can only reflect the desire of the bill's authors to effect substantive changes in the administration of the FPA and NGA, under the guise of a reorganization bill. Under the bill's approach the consumer-protection objectives of the FPA and NGA are being jettisoned by the administration in order to achieve, inter alia, ratemaking by rulemaking (rather than by adjudication) which could enable the administration to effect a policy of deregulation of electric and gas prices by administrative fiat.

Senate Hearings, supra note 41, at 108-09 (statement of Sen. Metcalf). *See id.* at 227-28 (statement of Robert C. McDiarmid, former Assistant to the General Counsel for FPC); *id.* at 514, 527 (testimony of Alex Radin, Executive Director, American Public Power Association); *id.* at 749 (statement of George M. Stafford, Chairman, ICC); *id.* at 785-86 (letter of Judge Curtis L. Wagner, Jr., Chairman, Committee on Status and Compensation, Member of Legislative Committee, Federal Administrative Law Judges Conference).

[61] S. 826, 95th Cong., 1st Sess. § 401(a) *Senate Hearings, supra* note 41, at 15 (1977). During hearings on the bill this proposed power of the Secretary was clearly recognized and heavily criticized. *See* note 99 *supra*.

> First it is, I think, essential to take a look at each of the functions performed presently by the FPC and determine whether they should or could be better handled in the Hearings and Appeals Board instrumentality rather than within other elements of the proposed department. As I understand it, the current proposal would give to the Secretary the right to decide which responsibilities should be assigned to the Hearings and Appeals Board. I believe that Congress should mandate those particular functions that in its judgment are to be handled by such a board and permit the Secretary to refer any matters in addition to those Congressionally mandated that he wishes to assign to the more formal judicial-like process of the Appeals Board. As an illustration, the responsibility for handling rate cases on the electric utility side of the FPC responsibilities, which normally involve disputes between sellers of electric energy to other utilities (privately, publicly, and cooperatively owned) is the type of issue that lends itself to a trial-like procedure rather than Executive Branch policy-making.

dures clearly were not statutorily required, the Secretary would have had the discretion to assign any other matter to the Board if he determined that adjudicatory procedures were nevertheless appropriate.[62] As the judicial arm of the new department, the Board could only have reacted to cases statutorily required to be brought before it or assigned to it at the discretion of the Secretary.[63]

Many proponents of the bill hoped that the Board's jurisdiction would be relatively limited.[64] They anticipated that matters

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Senate Hearings, supra note 41, at 212 (statement of Lee C. White, former Chairman, FPC). Senator Roth remarked that:

> They talk about any agency determinations required by law to be made on the record. But we will be doing away, as I understand it, with the FPC commission. And it is only FPC administrative practices that require determinations on the record. The law does not impose such requirements, so is there assurance that this Board has any jurisdiction beyond what the Secretary wants to give?
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> . . . .
>
> I have an open mind as to whether rulemaking is the proper approach or not, but it does seem to me that if they are going to move in that direction we have to build in some safeguards.

Id. at 522. Judge Curtis L. Wagner, Jr., Member of Legislative Committee, Federal Administrative Law Judges Conference stated that:

> As S. 826 now stands, the Board of Hearings and Appeals, or the energy court as we would prefer to call it, would have jurisdiction to hear and decide most rate cases only if, and to the extent that, the Secretary chose to delegate authority to the Board.
>
> It is not beyond the realm of reason to conjecture that some Secretary in the future might become dissatisfied with the Board's interface of facts, law, and policy and discipline the Board by merely withdrawing its jurisdiction.

Id. at 783. To similar effect, Representative Brown of Ohio observed that:

> Under the legislation submitted by the administration, the authorities of the Secretary that are taken over from the Federal Power Act and the Natural Gas Act—those authorities formerly held by the Federal Power Commission—would also embrace his opportunity to change those administrative procedures at his will. That is one of the big hooks here, because he might limit the administrative procedures under his own authority when the choice comes to him. I do not think they should be limited.

123 CONG. REC. H5,297 (daily ed. June 2, 1977).

[62] S. 826, 95th Cong., 1st Sess. § 401(a)(2)(B), *Senate Hearings, supra* note 41, at 15 (1977).

[63] *See id.* § 401(a)(2), *Senate Hearings, supra* note 41, at 15.

[64]

> The assumption is that the matters to be decided by the Hearings and Appeals Board would be the minimum that the courts will insist be decided that way, and the ones that the Secretary or the Administator decides should be determined in the rulemaking mode.

Senate Hearings, supra note 41, at 205 (testimony of Joseph C. Swidler, former Chairman, FPC). The Administration believed that the Secretary would be the dominant figure in the Department.

previously decided by adjudication, but fully susceptible of resolu-

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> *Secretarial role:* The Secretary or the Administrator of the Economic Regulatory Administration, as the Secretary's delegate, will carry out *informal rulemaking* and issuance of policy statements covering the regulatory areas within the Department. . . .
>
> In addition, the Secretary (or the Administrator of the Economic Regulatory Administration) will have the ability to issue *prospective rules simplifying some of the proceedings now conducted by on-the-records* [*sic*] *rulemaking or adjudication* to the extent that he is not constrained from doing so under the applicable organic statutes. *Until such time as the Secretary or the Administrator issues such rules, however, these types of formal rulemakings or adjudications will be performed by the Board of Hearings and Appeals,* as described below. . . .
>
> *Board of Hearings and Appeals role:* Initially, the Board of Hearings and Appeals would have jurisdiction over all proceedings which must be conducted on the record by law, and which the Secretary determines should be conducted on the record. Initially, it is anticipated that all proceedings conducted on the record under the practice of the constitutent agencies and commissions involved would continue to be so conducted.
>
> The Board of Appeals may determine to hear such matters initially itself, or may use Administrative Law Judges to make initial determinations which the Board would then review.
>
> In practice, this means that the Board would have jurisdiction over *much* of the FPC's current work load. Many of these proceedings, however, are now conducted by the FPC in a formal, on-the-record manner even though this is not required by existing statute and case law. In these areas, principally natural gas transportation and electric power rate-making, *the Secretary (or the Administrator of the Economic Regulatory Administration) would be free to attempt to establish, by rule, less formal procedures for determination in these areas.*

White House Fact Sheet, *supra* note 48, at 11 (emphasis added). *See generally Senate Hearings, supra* note 41, at 115-20 (letters from James R. Schlesinger, Assistant to the President, to Sen. Lee Metcalf as appended to statement of Sen. Metcalf).

In addition, many witnesses pointed out that the Secretary's potential control over the Board was not confined to jurisdiction, but also extended to staffing, budgeting appropriations, and other housekeeping areas.

> Senator ROTH. Dr. Schlesinger, I would like to follow up the question by Senator Glenn, with respect to an independent energy regulatory administration.
>
> You mentioned physically they will be separate.
>
> What about the housekeeping and personnel, will that come under the jurisdiction of the Department of Energy, or would they make their recommendations independently?
>
> Dr. SCHLESINGER. They make their recommendations independently.
>
> The administration would be handled by the central personnel office, but the selection of individuals would come from the Board of Hearings and Appeals and the like.
>
> Senator ROTH. What about the size of their personnel, and budget, would that be approved by the Department, or would that be directly, would that go directly to the Congress?
>
> Dr. SCHLESINGER. Both.
>
> If prior precedent were followed, the Congress would hear of any requests for money, or for personnel, from the Board of Hearings and Appeals, and the budget would be presented as a unified budget, rather than as a separate budget.

tion by rulemaking, could then be handled by rulemaking procedures.

> Senator Roth. But to that extent, and I am not saying that is wrong or right, it is a matter of policy, and the Cabinet Secretary would have assistants who would help with respect to those recommendations?
>
> Dr. Schlesinger. Yes, sir.

Id. at 139.

> There are other threats to true independence. For example, the bill gives the Secretary broad powers over the Board's budgetary process, over hiring, and over general administrative control. In addition, since the members of the Board are to be appointed by the President and are to hold relatively short terms of office (four years), there is a potential for dramatic changes with each change of administration.

Id. at 750 (statement of George M. Stafford, Chairman ICC).

> As an independent body, the Commission employs its own personnel. The present staff has developed considerable expertise and is of invaluable service to the Commission. Assuming these individuals are transferred to the Department of Energy, under the present structure they would presumably be assigned to the Economic Regulatory Administration. From there, they could be detailed to the Board. The failure to provide the Board with its own staff could thus give rise to at least two potential problems.
>
> The first and most obvious problem is that the ability of the Board to carry out its responsibilities could be crippled by the Secretary of the Department of Energy, if he were unsympathetic or unresponsive to the needs of the Hearings and Appeals Board. By his control over the budget and personnel functions of the new department, the Secretary would be in a position to dictate the size and character of the staff of the Board. If the staff were inadequate to perform properly the duties of the Board, regulation would suffer.
>
> A second problem is the ability of the Board to secure information it may need a [*sic*] regulate effectively. The Administration's energy reorganization plan calls for a centralization of energy information collection and dissemination. This approach should not foreclose assignment to the Board of personnel which will permit it to obtain data required to implement the provisions of the Federal Power Act, and to make available to the public information which will be of aid to consumers.

Id. at 528-29 (statement of Alex Radin, Executive Director, American Public Power Association).

> If the Board of Hearings and Appeals is to truly have the independence proposed by the President, it should have the authority to transmit appropriation requests directly to Congress without review by either the Secretary of Energy or any other element within the proposed department.

Id. at 782 (testimony of Judge Curtis L. Wagner, Jr., Member of Legislative Committee, Federal Administrative Law Judges Conference).

> In addition, the members of the Board of Appeals are reduced in level of pay from present FPC Commissioners. See, section 713 of S. 826. And by being located "within" the Department of Energy, the Board may necessarily become dependent upon the agency for appropriations, staff, office space and other operational necessities to a degree of practical dependence upon the Department.

Id. at 808 (Library of Congress, Congressional Research Services Analysis of Titles IV and V of S. 826, by Robert Poling, Legislative Attorney, American Law Division).

2. *The Economic Regulatory Administration*

As initially proposed, the Economic Regulatory Administration (ERA) clearly would have been one of the most powerful agencies within the Energy Department.[65] In addition to exercising control over the price and allocation of oil, ERA also was to have been in charge of natural gas ratemaking, natural gas curtailment and, in effect, all matters capable of being handled by rulemaking.[66] ERA's precise relationship to both the Secretary and to the Board of Hearings and Appeals was not entirely clear;[67] however, ERA clearly was intended to be one of the most powerful executive agencies under the Secretary.[68]

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[65] *See* S. 826, 95th Cong., 1st Sess. §§ 205, 301-310, 501(c), 502, 601-623, *Senate Hearings, supra* note 41, at 6-15, 19, 23-37 (1977).

[66] *See id.* §§ 205, 301, *Senate Hearings, supra* note 41, at 6-8. Section 301 transferred FEA authority to the Secretary, and § 205(b)(1) specified that the Secretary would "utilize the Economic Regulatory Administration to administer . . . any function which may be delegated to the Secretary under the Emergency Petroleum Allocation Act of 1973." Section 205(b)(3) authorized the Secretary to confer upon the ERA "such other functions as the Secretary may consider appropriate." As the Administration explained, the Secretary or the ERA "as the Secretary's delegate" would handle "all FEA regulatory activities." White House Fact Sheet, *supra* note 48, at 11. Moreover, "[a]ppeals from individual orders issued in the area of petroleum pricing and allocation will be through the same type of exceptions and appeals processes as are now used in FEA." *Id.* Administration statements and testimony show that rough comparisons were made between FEA and ERA on the one hand, and FPC and BHA on the other, at least insofar as their procedural nature was concerned. The major exception to the transfer of FEA to the Secretary/ERA was the proposed Energy Information Administration (EIA). *See* S. 826, 95th Cong., 1st Sess. § 204, *Senate Hearings, supra* note 41, at 6 (1977). FEA information-gathering functions, as well as those of other bodies incorporated within DOE, were to become EIA responsibilities. Notably, however, the *Secretary* was to make this delegation and could do so on a "non-exclusive basis," presumably permitting him to duplicate EIA authority elsewhere within DOE. Still, the EIA administrator could "act in the name of the Secretary for the purpose of obtaining enforcement of the delegated function." *Id.* § 204(c), *Senate Hearings, supra* note 41, at 6.

[67] Though the Secretary could "utilize" ERA to administer designated functions and "such other functions as the Secretary may consider appropriate" (S. 826, 95th Cong., 1st Sess. § 205(b), *Senate Hearings, supra* note 41, at 7 (1977)), the administrator of ERA was to be appointed by the President with the advice and consent of the Senate, rather than by the Secretary (*id.* § 205(b), *Senate Hearings, supra* note 41, at 6-7). The Board of Hearings and Appeals was to have jurisdiction "to hear and determine matters arising under any function vested in or delegated to the Secretary" involving agency determinations to be made on the record. *Id.* § 401(a)(2), *Senate Hearings, supra* note 41, at 15. Members of the Board were not to be "responsible to or subject to the supervision or direction of any officer, employee, or agent of the Department" (*id.* § 401(d), *Senate Hearings, supra* note 41, at 16), nor were Board decisions to be subject to further review by the Secretary or any officer or employee of the Department (*id.* § 401(e), Senate Hearings, *supra* note 41, at 16). *See* notes 53-57 and accompanying text *supra*.

[68] Indeed, the most significant fact about ERA authority was its definition as a secretarial creature. The Administration bill and supplementary explanations make it clear that no line of independence between ERA and the Secretary was foreseen; the latter had dis-

C. *The Department of Energy Organization Act of 1977*

The Department of Energy created by Congress[69] differed significantly from the Administration's proposal. Congress rejected the President's plan to centralize substantial power under executive control.[70] Congress preferred a relatively weak executive whose power is, to a large extent, offset by a strong independent regulatory commission—the Federal Energy Regulatory Commission (FERC).[71] The Administration's proposed Board of Hearings and Appeals would have been simply an agency court; the commission Congress created, however, is essentially the Federal Power Commission reincarnated, an independent commission responsible for a wide range of energy programs similar to those of its predecessor.[72]

The resulting Department of Energy thus consists of both an executive agency[73] and an independent regulatory commission.[74] The Act allocates significant powers to a newly created cabinet level office of Secretary, and to various executive departments under his supervision and control.[75] But it provides even greater powers to FERC.[76] The net result is not only an agency of enormous size, complexity and power, but one whose power is considerably fragmented.

Under the new Act, the old problem of interagency fragmentation has, to a large extent,[77] given way to a new problem—

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cretion to make and change the division of authority between them. *See* S. 826, 95th Cong., 1st Sess. § 205(b), *Senate Hearings, supra* note 41, at 7 (1977). There was never an attempt to distinguish ERA as a clearly defined and autonomous office; in fact, ERA itself received relatively little comment or analysis. Instead, the congressional focus was directed at the Secretary and the Board of Hearings and Appeals as the significant statutory entities. *See generally* notes 61 & 64 *supra*.

[69] DOE Act, Pub. L. No. 95-91, 91 Stat. 567 (codified primarily at 42 U.S.C. §§ 7101-7352 (Supp. I 1977)).

[70] *See* notes 110-14 and accompanying text *infra*.

[71] *See* notes 47-48 and accompanying text *supra;* notes 112-14 and accompanying text *infra*.

[72] *See* text accompanying notes 94-98 *infra*.

[73] Byse, *supra* note 38, at 198-201.

[74] 42 U.S.C. §§ 7171-7177 (Supp. I 1977) ("Federal Energy Regulatory Commission").

[75] *See* notes 99-108 and accompanying text *infra*.

[76] *See* notes 94-98 and accompanying text *infra*.

[77] Interagency fragmentation still exists to a large extent. Though many agencies were consolidated within the new Department,

> there are still at least sixteen federal regulatory agencies, within and outside the executive branch, each created and governed by its own separate statutes, with responsibilities that directly affect the price and supply of energy:

intraagency fragmentation. The Act disperses powers among the

AGENCY	*FUNCTION*
Department of Energy (Executive)	Price and allocation regulation for oil products, fuel selection for power plants, energy research and development.
Federal Energy Regulatory Commission (Quasi-Independent)	Interstate gas pipeline and electricity rates and gas field prices; new conventional power plant licensing; veto over certain DOE decisions.
Nuclear Regulatory Commission (Independent)	Nuclear energy plant licensing, nuclear fuel export.
Department of the Interior (Executive)	Offshore oil and gas leasing, public land leasing for oil, gas, and coal, coal mine safety, wilderness and endangered species protection.
Interstate Commerce Commission (Independent)	Oil and coal slurry pipeline routes and rates.
Department of Commerce (Executive)	Tanker construction and safety, marine sanctuaries.
Environmental Protection Agency (Executive)	Vehicle and smokestack emission levels, water quality, wildlife impact, veto over DOE power plant coal conversion orders.
National Highway Traffic Safety Administration (Department of Transportation) (Executive)	Safety regulations affecting vehicle weight and fuel consumption; miles per gallon requirements for vehicle output.
U.S. Coast Guard (Department of Transportation) (Executive)	Inspection of tankers and LNG carriers and monitoring their movements.
Materials Transportation Bureau (Department of Transportation) (Executive)	Pipeline safety.
Occupational Safety and Health Administration (Department of Labor) (Executive)	Workplace levels for benzene and other energy-related substances.

various executive units and FERC.[78] FERC exercises broad authority over wholesale electric rates[79] and wellhead and pipeline natural gas rates,[80] as well as oil pipeline rates,[81] but the Secretary, or an executive unit under his supervision and control, regulates wellhead oil prices[82] as well as the allocation of oil among various categories of buyers.[83] The Commission has authority to develop natural gas curtailment plans,[84] but the Secretary is authorized to set curtailment priorities.[85] The Commission can issue certificates of public convenience and necessity relating to the importation of liquid natural gas,[86] but authority to determine overall import policy resides with the Secretary.[87] In addition to

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Consumer Product Safety Commission (Independent)	Safety of home insulation and other energy-related materials and equipment.
Internal Revenue Service (Department of Treasury) (Executive)	Tax regulations affecting energy producers and consumers.
International Trade Commission (Independent)	Import injury and relief, including tariffs and quotas on energy imports.
Federal Trade Commission (Independent)	Antitrust regulation and litigation involving energy industry.
Department of Justice (Executive)	Antitrust regulation and litigation involving energy industry.

> With sixteen captains holding a different spoke of the wheel, it is no wonder that the Government finds it difficult to steer a firm energy course.

Commission on Law and the Economy, American Bar Association, Federal Regulation: Roads to Reform 105-08 (proof of final report Sept. 1979) (footnote omitted) [hereinafter cited as ABA Report].

[78] 42 U.S.C. §§ 7131-7172 (Supp. I 1977).

[79] *Id.* § 7172(a)(1)(B).

[80] *Id.* § 7172(a)(1)(C).

[81] *Id.* § 7172(b).

[82] *Id.* § 7151. *See* S. Rep. No. 164, 95th Cong., 1st Sess. 39-40, *reprinted in* [1977] U.S. Code Cong. & Ad. News 854, 893; H.R. Rep. No. 539, 95th Cong., 1st Sess. 78, *reprinted in* [1977] U.S. Code Cong. & Ad. News 925, 949. In general, FPC functions not transferred to or vested in the FERC by § 7172 are transferred to the Secretary by § 7151.

[83] 42 U.S.C. § 7151 (Supp. I 1977).

[84] *Id.* § 7172(a)(1)(E).

[85] *Id.* §§ 7151(b), 7172(a)(1)(E).

[86] *Id.* § 7172(a)(1)(D).

[87] *Id.* § 7172(f). *See* note 82 *supra. See also* 42 U.S.C. §§ 7151, 7172(a)(1)(D) (Supp. I 1977); H.R. Rep. No. 539, 95th Cong., 1st Sess. 65, 74-79, *reprinted in* [1977] U.S. Code

this separation of substantive powers between the executive and the Commission, the Act provides for further checks and balances within the agency. The most important provisions of this sort authorize Commission review of both adjudicatory and legislative decisions made by the executive agency.[88]

The evolution of the Federal Energy Regulatory Commission and its powers was precipitated by Congress' fear of excessive executive control.[89] At the root of this fear was the uncertainty in Congress over the possible substantive policies the President actually might propose and in any event the lack of any consensus on the appropriate substantive policy options.[90] Many legislators anticipated the worst. Congress eventually assuaged at least some of its fears, not by resolving the substantive questions, but by building a set of checks and balances into the structure of the new agency.

Perhaps the foremost "anticipated problem" was the possibility of total deregulation of natural gas.[91] Many members of Con-

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CONG. & AD. NEWS 925, 935-36, 945-950.

There was, however, a good deal of uncertainty over the extent of the Secretary's authority over imported natural gas. On October 17, 1978, the Secretary published a final order delegating to ERA and FERC certain functions concerning the regulation of exports and imports of natural gas. Importation and Exportation of Natural Gas, 43 Fed. Reg. 47,769 (1978). The question as to which agency had jurisdiction over which aspects of such cases arose because § 402 of the DOE Act, 42 U.S.C. § 7172 (Supp. I 1977), specifically gave to FERC regulatory jurisdiction under §§ 4, 5, and 7 of the Natural Gas Act, 15 U.S.C. § 717c, 717d, 717f (1976), but assigned to the Secretary of Energy the general authority to "regulat[e] the exports or imports of natural gas." 42 U.S.C. § 7172(f) (Supp. I 1977). The provision failed to limit the Secretary's authority specifically to matters arising under § 3 of the Natural Gas Act, 15 U.S.C. § 717b (1976), and the Secretary could have construed his authority broadly to regulate *all* aspects of natural gas import or export projects. The delegation orders attempt to clear this problem up by, in effect, assigning all nuts and bolts matters to FERC. Specifically, FERC now has authority over such applications pursuant to §§ 1, 4, 5 and 7 of the Natural Gas Act, 15 U.S.C. §§ 717, 717c, 717d, 717f (1976), but also pursuant to § 3, 15 U.S.C. § 717b (1976), insofar as the functions thereunder are representative of those areas traditionally within the expertise of FERC's predecessor, the Federal Power Commission.

Nevertheless, it is interesting to note that Charles Curtis, Chairman of FERC, recently urged Congress to consider "whether the decision with regard to importation of natural gas should best be placed entirely in the Commission in one proceeding." Foster Report No. 122, Aug. 9, 1979, at 5 (on file at *Cornell Law Review*).

[88] *See generally* 42 U.S.C. §§ 7172(b)-(c), 7173, 7174, (Supp. I 1977). *See also* text accompanying notes 142-48 *infra*.

[89] Byse, *supra* note 38, at 198-203.

[90] *See* notes 35-40 and accompanying text *supra*.

[91] *See* note 93 *infra*.

The deregulation battle lines began to form prior to the submission of the bill that eventually became the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat 3350 (codified at 15 U.S.C. §§ 3301-3432 (Supp. II 1978)). Congress' fears over deregulation were gress feared that James Schlesinger would become the new Secretary and that given secretarial authority over natural gas pricing, he might attempt to effect substantial or total decontrol.[92] To guard against a decontrol-oriented policy of any new Secretary, as well as to prevent too great a concentration of power within the executive, many of these members favored structural proposals that would provide significant administrative checks and balances within the department, particularly on pricing decisions made by the Secretary.[93]

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made explicit when debate over that bill began. *See Natural Gas Pricing Proposals of President Carter's Energy Program: Hearings on S. 256 and S. 1469 (Part D) Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 42-45 (1977). Congress stalled the bill for over a year and passed it in such a compromised form that the effectiveness of the Act has been extensively criticized since the day it went into effect. One commentator has described it as "an intricate labyrinth of regulatory provisions" that "may well be the most complex regulatory statute ever enacted in the United States." Pierce, *Natural Gas Policy Act of 1978—Change, Complexity, and a Major New Role for the KCC*, 47 J. KAN. B.A. 259, 274 (1978). This complexity resulted from Congress' inability to decide the decontrol issue. *Id.* at 260-61.

[92] *See Nomination of Dr. James R. Schlesinger to be the Nation's First Secretary of Energy: Hearing Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 9, 12-13, 63, 73-74 (1977).

Many observers recognized that one reason Congress created FERC was to prevent the Energy Secretary from effecting substantial decontrol. In urging Congress to give the power to determine natural gas prices to the Secretary rather than FERC, one editorial writer stated:

> The fear of the legislators, of course, is not the the President [and the Secretary] would peg prices too low but that [they] would raise them higher than the voters might enjoy. Exactly the President's intent although he himself was less than forthright about it when he first proposed this innocent sounding "reorganization" measure to consolidate all Government agencies dealing with energy.

N.Y. Times, June 7, 1977, at 34, col. 1-2. This reason for the amendment was at least implicitly acknowledged during the House debate over the amendment:

> Mr. SYMMS: . . .
>
> Then is the gentleman telling us that the Secretary of Energy of the Department of Energy will deregulate the price of natural gas because if the Congress will not do that, all of this argument is superficial anyway?
>
> Mr. LEVITAS: I cannot speak for what the new Secretary will do. He certainly cannot do any worse than what has happened so far.
>
> I have heard the President's energy message, and it sounds a lot more like a movement in the direction of deregulation to stimulate production than do the actions taken by the Federal Power Commission . . . .

123 CONG. REC. H5,314 (daily ed. June 2, 1977). *Cf.* note 93 *infra* (because of these fears compromise plan checked Secretary's power to set price regulations).

[93] Senator Percy stated:

> Authority for setting oil and gas prices was, perhaps, the most controversial issue which was resolved in conference. Many were worried by the administration proposal to place all pricing authority in the hands of the Secretary of

1. *The Federal Energy Regulatory Commission*

The foremost structural check on executive power was (and still is) the Federal Energy Regulatory Commission (FERC), an in-

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> Energy. At the same time it was necessary that pricing issues be resolved expeditiously and with some input from the Secretary so that pricing policy is consistent with other energy policies.
>
> This legislation accomplishes both ends. It establishes an independent 5-member Federal Energy Regulatory Commission to oversee all pricing decisions. It also allows the Secretary of Energy, a political appointee, to initiate pricing actions and to participate in Commission proceedings where appropriate.

123 CONG. REC. S13,282 (daily ed. Aug. 2, 1977). Senator Javits remarked that:

> Mr. President, the key point is not where the central power lies; the key point is how well will the public be served. The conferees have placed great authority in a five-member politically balanced and independent commission, the Federal Energy Regulatory Commission. When decisions regarding the fair and reasonable price to be charged consumers is in issue, these decisions will be made without regard to political pressures. These decisions will be made as a result of public hearings with all parties represented.
>
> This balance is essential to ensure that the functions of the Department, other than its regulatory functions, will not interfere with the quasi-judicial, regulatory function. We have, in that respect, I believe, tread successfully the fine line between the interests of producers and the needs of consumers.

Id. S13,286. Representative Eckhardt declared:

> Mr. Chairman, I feel that those who have said it makes no difference whether the authority to regulate price be within the executive department or be protected by a collegial body simply do not understand the basis of this process. We have delegated, and probably necessarily so, the greatest amount of power in this area of energy that this Congress has ever delegated. If we delegate that power directly to the Secretary of a department of the executive branch, we are confounding the situation. We are creating a situation in which the delegation of authority from Congress to engage in policymaking is to the head of a department of the executive branch. I think that would be a grave mistake.
>
> The gentleman from Ohio (Mr. BROWN) has pointed out the enormous authority, almost unlimited with respect to procedure, that has been granted to the FEA. Add to that the authority of the Federal Power Commission and leave all this to an executive department's unbridled authority and Congress will have indeed abdicated from its constitutionally defined position as prime policymaker in our divided system of government. We all know that we have some greater opportunity to oversee and influence a regulatory agency, from both sides of this aisle, than to oversee and influence a part of the executive family. We know that the regulatory agencies have to be more nonpartisan, because they have to answer to Congress more directly than do those receiving a part of the executive budget—that of a department. These departments in the executive family can transfer funds from one area to another. Why should we delegate so much authority here today?

Id. H5,316 (daily ed. June 2, 1977).

But these fears were, to some extent, misguided. As Representative Brooks succinctly observed in urging passage of the energy bill: "[T]he Secretary will not have any powers that have not been created by Congress. What Congress gives, it can take away." *Id.* H5,270.

dependent commission which replaced the old Federal Power Commission. Like its predecessor, FERC consists of five members appointed for staggered terms of four years.[94] They are appointed by the President with advice and consent of the Senate, and can effectively be removed only for cause.[95] The new Commission is thus independent of direct Presidential or Secretarial control. It retains virtually all of the old FPC's powers under the Natural Gas Act including its ratemaking, certificate and licensing authority[96] and now has jurisdiction over oil pipelines as well.[97]

In exercising its powers, FERC clearly is in the Department of Energy but not of it. FERC decisions are not subject to review within the Department. They constitute final agency action and can be reviewed only by the courts.[98] This is not, however, the case for many oil pricing decisions made by the executive wing of the Department.

2. *Executive Regulatory Functions*

The Secretary and executive agencies under his supervision exercise broad authority with regard to gathering and collecting information,[99] research and development,[100] conservation,[101] self-inspection,[102] and certain energy-regulatory duties.[103] Of particular interest are the executive regulatory functions. The DOE Act transferred to the Secretary the authority to regulate the price and allocation of domestic crude oil.[104] The Secretary, in turn, has delegated this power to FEA's successor, the Economic Regulatory Administration (ERA).[105] Thus, ERA has the power to set the price of first sales of domestic crude oil, the price of residual fuel oil, and the price of refined petroleum products such as propane, butane, and naptha.[106] It also has the authority previously exercised by FEA to allocate coal among those plants prohibited from consuming oil or gas.[107] In addition, the Secretary controls the regulation of imports and exports of natural gas and electricity.[108]

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[94] 42 U.S.C. § 7171(b) (Supp.I 1977).

[95] *Id.* It is important to note that the members of FERC are not "statutorily protected against summary removal from office; but the 'political inadvisability of such a traumatic step' helps protect them against dismissal, none the less." W. Gellhorn, C. Byse & P. Strauss, Administrative Law 131 (7th ed. 1979). The authors go on to speculate that: "The reason that . . . FERC . . . members have no explicit statutory protection against removal is, doubtless, that those agencies were created after the Myers case and before the Humphrey case, at a time when legislative draftsmen believed the President's power to be illimitable." *Id.* at 131 n.7.

[96] 42 U.S.C. § 7172(a)-(b) (Supp. I 1977), *as amended by* Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified at 15 U.S.C. §§ 3301-3432 (Supp. II 1978)).

[97] 42 U.S.C. § 7172(b) (Supp. I 1977). The Conference Report makes clear that FERC's jurisdiction over oil pipelines is extremely broad. *See* H.R. Rep. No. 539, 95th Cong., 1st Sess. 75-76, *reprinted in* [1977] U.S. Code Cong. & Ad. News 925, 946-47.

[98] *See* 42 U.S.C. §§ 7172(g), 7192 (Supp. I 1977).

[99] *Id.* § 7135(a) (gathering and collecting information which is relevant to energy resource reserves, production, demand, technology, and related information relevant to adequacy of energy resources to meet demands).

[100] *Id.* § 7139 (energy research and development).

[101] *Id.* § 7112(2) (delaring Congress's purpose that DOE coordinate energy conservation throughout the federal government); *id.* § 7132(b) (providing for an Under Secretary who "shall bear primary responsibility for energy conservation" as well as whatever other duties the Secretary delegates); *id.* § 7133(a)(9) (listing various conservation functions as among the duties of Assistant Secretaries); *id.* § 7266 (requiring various other departments and agencies to designate their own "principal conservation officer[s]").

3. *FERC as a Check on Executive Power*

By arming the Secretary with the significant powers outlined above, as well as other functions,[109] Congress granted formidable authority to a centralized executive department. But the powers simultaneously accorded FERC substantially offset this executive power. Indeed, FERC's capability to check the exercise of executive power is particularly evident in the Commission's authority to review many executive decisions.

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[102] *Id.* § 7138 (self-inspection to detect fraud or abuse in programs and operations).

[103] *Id.* § 7136 (establishing the Economic Regulatory Administration as the Secretary's primary vehicle for regulatory action).

[104] *Id.* § 7151(a). These powers previously had been exercised by FEA under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760(h) (1976). *See id.* § 757 (granting authority to President to regulate price and allocation of domestic crude oil); *id.* § 754(b) (granting authority to President to delegate his authority under this Act); *id.* § 764(a) (functions of FEA include those delegated to it by President); Exec. Order No. 11,748, 38 Fed. Reg. 33,575 (1973) (delegating to FEO all authority vesting in President by EPAA and § 203(a)(3) of Economic Stabilization Act of 1970); Exec. Order No. 11,790, 39 Fed. Reg. 23,185 (1974) (transferring to FEA functions previously exercised by FEO).

[105] DOE Delegation Order No. 0204-24, 42 Fed. Reg. 60,726 (1977).

[106] ERA derives its authority by delegation of powers that originate in the old substantive provisions of 15 U.S.C. §§ 757, 753 (1976).

[107] *Id.* § 792(d).

[108] The DOE Act, 42 U.S.C. §§ 7151(b), 7172(f) (Supp. I 1977), transferred from the old FPC to the Secretary the authority to regulate imports and exports of natural gas under section 3 of the Natural Gas Act, 15 U.S.C. § 717b (1976). *See also* note 87 *supra*. Similarly, the Secretary assumes FPC's authority over the importation and exportation of electrical power under Exec. Order No. 10,485, 18 Fed. Reg. 5,397 (1953).

[109] *See, e.g.*, 42 U.S.C. § 7152(a) (Supp. I 1977). That section transfers to the Secretary the power to regulate and control certain power-marketing and power-transmission functions which previously were scattered among several authorities, including the Southeastern Power Administration, the Southwestern Power Administration, the Alaska Power Administration, and the Bonneville Power Administration. The Secretary also took over from the Department of Interior a number of functions concerning the leasing of federal lands. *Id.* § 7152(b). Such functions included: (1) developing and regulating bidding systems for the award of federal leases; (2) the establishment of diligence requirements for operations on federal leaseholds; (3) the specification of lease terms and procedures; and (4) the setting of production rates for leaseholds. *Id.* The Act also transferred to the Secretary from

a. *FERC Review of Executive Rulemaking—The Commission Veto.* The DOE Act delegates a legislative veto power to FERC.[110] The Secretary may not take certain energy action[111] or adopt "rules, regulations, and statements of policy" which "may significantly affect any function within the jurisdiction of the Commission"[112] unless the Commission agrees with this action or the Secretary adopts the changes specified by the Commission.[113] Where the Commission recommends nonadoption, the Secretary may not act at all. The Commission's veto authority is absolute, for both the entire proposed rule and any portion of it.[114] Thus, in reviewing certain secretarial rules FERC can effectively thwart certain policy actions proposed by the Secretary.

b. *Commission Review of Executive Adjudication.* In addition to its veto power, the Commission exercises judicial powers over sec-

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the Department of Housing and Urban Development the authority to develop and promulgate energy standards for new buildings, pursuant to § 304 of the Energy Conservation Standards for New Buildings Act of 1976, 42 U.S.C. §§ 6833, 7154 (Supp. I 1977). In addition, the Act transferred to the Secretary from the Secretary of the Navy jurisdiction over various naval petroleum reserves and oil shale reserves. *Id.* § 7156.

There are, however, certain key omissions from the Secretary's authority. In addition to those powers exercised by FERC, the Secretary apparently lacks authority over coal-slurry pipelines and the rail transportation of coal. *See* 123 CONG. REC. H8,256 (Aug. 2, 1977) (remarks of Rep. Horton, a Conference Committee member).

[110] 42 U.S.C. § 7174 (Supp. I 1977). Congress has retained a veto power over certain energy actions as well. Under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760h (1976), *as amended by* the Energy Policy and Conservation Act, 42 U.S.C. § 6421 (1976), any major oil pricing or allocation decision by the then-FEA was subject to a 15-day congressional veto procedure. The DOE Act retains this congressional veto power, but provides an opportunity for a Commission veto before the congressional veto. 42 U.S.C. § 7172(c)(1) (Supp. I 1977).

[111] 42 U.S.C. § 7172(c)(1) (Supp. I 1977). Energy actions are any actions taken by the Secretary under 15 U.S.C. §§ 757, 760 (1976). They include, for example, any rules seeking to exempt petroleum products from regulation as well as any amendment to adjust the composite price of crude oil in excess of 10% per annum. The Secretary must refer such matters to the Commission. 42 U.S.C. § 7174(a) (Supp. I 1977); H.R. REP. No. 539, 95th Cong., 1st Sess. 77, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 925, 948.

[112] 42 U.S.C. § 7174(a) (Supp. I 1977).

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[113] *Id* § 7174(c). *See also* H.R. REP. No. 539, 95th Cong., 1st Sess. 80, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 925, 951. FERC's action, however, is not final agency action, and there can be no judicial review until the Secretary acts upon FERC's recommendations. 42 U.S.C. § 7174(c) (Supp. I 1977).

[114] 42 U.S.C. § 7174(c) (Supp. I 1977).

retarial action. It may review the Secretary's issuance of remedial orders directed at alleged violators of any rule, regulation, or order promulgated under the Emergency Petroleum Allocation Act of 1973.[115] Moreover, the Commission has the authority to review all denials of petitions for various adjustments from rules or regulations issued pursuant to the DOE Act.[116] With regard to certain oil pricing decisions made by the Secretary, FERC is, in effect, an in-house court.

The DOE Act was not sufficiently clear when it came to defining the relationship between the Secretary and the Commission in general[117] and the scope of the Commission's adjudicatory role

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[115] *Id.* § 7193(c).

[116] *Id.* § 7194(b).

[117] Though the primary result of the Act's progress from Carter bill to congressional enactment is the division of power between two competing entities, the Secretary and the FERC, Congress left their precise relationship unresolved. Debate over the Moss amendment to the bill included at least one recognition that, regardless of the statutory allocation of authority, an inevitable tension would exist between these two entities:

> Mr. EVANS of Colorado. . . . It seems to me that we might have a two-headed horse, in a way. We might have a President and a Secretary of Energy who want to take a certain direction in regard to energy, and we might have an independent commission that thinks that the President and Secretary are wrong and feel that we ought to go another way. What would be the situation if this amendment passes?
>
> Mr. DINGELL. I think we have a horse with two heads or two tails—the gentleman can take his pick—where under the bill as drawn, or under the amendment as offered by the gentleman in California, in either event we have a Secretary and we have a Commission. What we are doing is defining which end of the horse is going to go which way under which particular set of circumstances at which time. Also, we lay out a set of circumstances where it will function more in the daylight and less in the dark, where there will be more public input and more public appreciation of what is going on, and less action by that two-headed horse, or two-tailed horse, in the dark. That is the basic difference.
>
> Mr. EVANS of Colorado. The problem to which the gentleman alludes is inherent within the bill?
>
> Mr. DINGELL. Regardless of whether the Moss amendment is present or absent.

123 CONG. REC. H5,313 (daily ed. June 2, 1977).

Members of both houses expressed the view that since DOE would be a new agency, Congress should take a wait-and-see attitude regarding its ultimate structure and size:

> This has been a hard assignment; it will continue to be. I think all of us agree that it is not the final word in a Department of Energy. The Senator from Connecticut, the distinguished chairman, observed from time to time that there had to be trial and error in this kind of operation. After this department has functioned awhile and has gone through a shake-down period, we will be in a better position to determine whether any changes are necessary and will be able to deal with those issues at an appropriate time.

Id. S7,916-17 (daily ed. May 18, 1977) (remarks of Sen. Jackson).

> I also feel that this agency needs to have the opportunity to find out how best to perform its functions. It might be that after operating for a while, it can

in particular. From the face of section 503 of the statute, the Commission arguably could have the power of de novo review of executive adjudications.[118] The Commission has chosen, instead, to play more of an appellate role. The preference for the appellate role is prompted largely by the executive agency's development of elaborate procedures for issuing remedial orders in the executive wing of the agency.

II

Administering and Enforcing Oil Price Controls—A Temporary Emergency Becomes A Way of Life

The overlay of FERC review with executive remedial order procedures has resulted in a gaggle of administrative procedures.

> reduce the number of employees. However, it does have a tremendous responsibility. I believe the Congress has a hold on the number of employees, through the authorizing and appropriating committees when this agency has to come before us for its budget authorizations. . . . That would be the manner in which we should attack this.

Id. H5,387 (daily ed. June 3, 1977) (remarks of Rep. Horton concerning proposed, but later defeated, amendment to place a statutory limit on the number of DOE employees).

The political climate which gave rise to the DOE Act did not encourage careful, deliberate consideration of details or implications. For example, Senator Durkin offered some rather acerbic comments that illustrate the atmosphere during final debate over the Administration Bill:

> This may be the finest bill this body has ever passed, or it may be the worst, but I estimate that 75 percent of the membership does not know whether it is the best or the worst.
>
> This thing is slid through. I am afraid that many constituents across the country, when they see the impact of this bill on energy prices and the impact on the appeal procedure, will want to know who voted for this thing, will want to know who supported it.
>
> However, as the Senator from Idaho said, I can read the tea leaves; I can read the handwriting on the wall. This bill is going to be passed. . . .
>
> . . . .
>
> . . . I am not going to keep people here any longer tonight. I am going to vote "no" on this bill because I think it has been taken up and moved too fast, and I submit that there are many Members in the Chamber who do not know what this bill does.

Id. S7,958 (daily ed. May 18, 1977). Durkin later voted against the Conference Report. *See id.* S13,291 (daily ed. Aug. 2, 1977).

[118] Section 503(c) of the DOE Act provides:

> If within thirty days after the receipt of the remedial order issued by the Secretary, the person notifies the Secretary that he intends to contest a remedial order issued under subsection (a) of this section, the Secretary shall immediately advise the Commission of such notification. Upon such notice, the Commission shall stay the effect of the remedial order, unless the Commission finds the public interest requires immediate compliance with such remedial order. The Commission shall, upon request, afford an opportunity for a hearing,

Congress authorized FERC review largely in response to the inadequate procedures employed by the executive agencies originally charged with enforcing the Emergency Petroleum Allocation Act.[119] But the executive procedures that recently have evolved may now render FERC review superfluous. To understand why Congress conferred this authority on FERC in the first place, as well as to evaluate the wisdom and efficacy of continuing FERC review, the history of the oil enforcement process must first be examined.[120]

A. *Acting in an Emergency—The Initial Lawmaking Stage*

Hasty lawmaking often breeds future difficulties. The initial federal response to the OPEC embargo of 1973 was rushed and confused both at the legislative stages and the administrative stages of the program.

1. *Legislation in a Crisis*

Congress passed the Emergency Petroleum Allocation Act (EPAA) during a time of perceived crisis.[121] Like many

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> including, at a minimum, the submission of briefs, oral or documentary evidence, and oral arguments. To the extent that the Commission in its discretion determines that such is required for a full and true disclosure of the facts, the Commission shall afford the right of cross examination. The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's remedial order, or directing other appropriate relief, and such order shall, for the purpose of judicial review, constitute a final agency action, except that enforcement and other judicial review of such action shall be the responsibility of the Secretary.

42 U.S.C. § 7193(c) (Supp. I 1977). This section can be read to require de novo review by FERC. *See* note 192 *infra*.

Section 503, however, provides for secretarial issuance procedures. This section has been read to authorize substantial procedural requirements in the executive wing of the agency. *See* note 192 *infra*.

[119] *See* notes 156-70 and accompanying text *infra*.

[120] Though the focus of this Article is on the enforcement process within DOE, much of the analysis dealing with unnecessary duplication of administrative procedures is applicable to the adjustment process carried out by the Department under its authority in § 504 of the DOE Act, 42 U.S.C. § 7194 (Supp. I 1977). Pursuant to this provision, FERC has authority to review denials of requests for adjustments by the executive. Like § 503 of the Act it mandates certain minimum procedures the commission must provide. This process is considered in detail in a preliminary report submitted to the Administrative Conference. A. Aman, The Concept and Process of Administrative Equity: A Preliminary Report to the United States Administrative Conference (Apr. 30, 1979) (on file at *Cornell Law Review*).

[121] *See Federal Energy Administration's Enforcement of Petroleum Price Regulations: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. 7 (1975) [hereinafter cited as *FEA Hearings*] (testimony of Frank G. Zarb).

"emergency" measures, including various energy bills enacted to date,[122] a sense of an acute need, sugarcoated by an expectation that the emergency was temporary, spurred the passage of the EPAA; the shock to our system caused by OPEC's actions was serious but its effects were not expected to linger. Under these circumstances, the strong medicine Congress prescribed—a broad grant of substantive power to the executive branch to control the price and allocation of domestic crude oil coupled with expedited procedures to implement and enforce this program—was readily acceptable.

In passing the EPAA, Congress borrowed heavily from the wage and price control legislation that immediately preceded its action, the Economic Stabilization Act of 1970.[123] The EPAA simply incorporated by reference the procedures for administrative decisionmaking and judicial review promulgated in the 1970 Act and employed by the Cost of Living Council. Like the Stabilization Act, the EPAA specifically exempted its administrators from many of the requirements of the Administrative Procedure Act, particularly those governing adjudicatory hearings.[124] Similarly, the EPAA incorporated the two-tier judicial review approach used under the Economic Stabilization Act: final enforcement orders are appealable first to a federal district court and then to a specialized appellate court, the Temporary Emergency Court of Appeals.[125]

See also Presidential Task Force Report, *supra* note 18, at 5-14; notes 21-24 and accompanying text *supra*. *See also* 2 Sporkin Report, *supra* note 9, at i.

[122] *See, e.g.*, Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, 91 Stat. 4 (codified at 15 U.S.C. §§ 717-717u (Supp. I 1977). For pending legislation, see S. 1308, 96th Cong., 2d Sess. (1979); H.R. 4985, 96th Cong., 2d Sess. (1979) (presently pending Energy Mobilization Board legislation).

[123] Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, *as amended by* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, *as amended by* Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, 87 Stat. 27, *reprinted at* 12 U.S.C. § 1904 note (1976).

[124] Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 207(a), 85 Stat. 747. As one commentator has noted: "Having concluded that the requirements of the Administrative Procedure Act would result in 'too cumbersome and dilatory a procedure,' Congress exempted, in the 1971 amendments, the control agencies from most of the Act's provisions." Comment, *Administration and Judicial Review of Economic Controls*. 39 U. Chi. L. Rev. 566, 579-80 (1972) (footnotes omitted). For a discussion of these procedures and their relationship to the APA, see Note, *Phase V: The Cost of Living Council Reconsidered*, 62 Geo. L.J. 1663, 1679-90 (1974).

[125] The EPAA, 15 U.S.C. § 754 (a)(1) (1976), incorporated by reference §§ 205-207, 209-211 of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, *as amended by* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat.

2. *Regulations in a Crisis*

The urgency of the crisis, which had hurried Congress' enactment of the EPAA, undoubtedly would have accelerated the administrative action pursuant to this Act. But the administrators involved were subject to a congressional edict to act with dispatch. The EPAA required that regulations providing for the mandatory allocation at "equitable prices" of crude oil, residual fuel and various refined petroleum products[126] be issued within fifteen days of the Act's passage.[127] Shortly after President Nixon signed the Act

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743, *as amended by* Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, 87 Stat. 27, *reprinted at* 12 U.S.C. § 1904 note (1976). Section 211 (d)(1) of the amended Act sets forth the appropriate standard for judicial review of agency action:

> [N]o regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(d)(1), 85 Stat. 749.

Agency actions are reviewable in two stages. Section 211(a) of the Economic Stabilization Act, as amended, granted exclusive original jurisdiction over controversies arising under the title in the federal district courts. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(a), 85 Stat. 748, *reprinted at* 12 U.S.C. § 1904 note (1976). Section 211(b)(2) of the Act's amendments further created a special appellate court to review district court decisions under the EPAA—the Temporary Emergency Court of Appeals—and provided that "Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." *Id.* § 211(b)(2), 85 Stat. 749, *reprinted at* 12 U.S.C. § 1904 note (1976).

Both the district courts and the Temporary Emergency Court of Appeals historically took a most deferential approach in reviewing FEA decisions. *See* Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113, 128-29. Moreover, even district court review of an FEA remedial order is appellate in nature. The provisions of the Economic Stabilization Act incorporated by reference did not authorize a district court reviewing FEA decisions to grant a de novo hearing as a matter of right. Rather the statute authorized application of a substantial evidence test (Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(e)(1)(B), 85 Stat. 749) to a record that may have been incomplete and was compiled by a factfinder who may not have been completely independent (*see* text accompanying notes 156 & 162 *infra*). In short, although judicial review was provided, the complainant may not have received a full or fair evidentiary hearing.

[126] 15 U.S.C. § 753(a),(b)(1)(F) (1976). *See also* Mandatory Petroleum Allocation Regulations, 39 Fed. Reg. 1,924, 1,932-49 (1974).

[127] 15 U.S.C. § 753(a) (1976).

into law, he established the Federal Energy Office (FEO).[128] Within one week of FEO's creation, it issued the mandatory regulations required by the Act.[129]

Administrators of any complicated regulatory program often are denied the luxury of time to think through all of the consequences of the drastic actions required in a crisis. The energy program was an acute case: the time constraints were unusually tight, and technical expertise in and an understanding of regulation as it affected a diverse and enormously complex petroleum industry was, to a large extent, lacking.[130] Given such handicaps, it is hardly surprising that FEO officials followed Congress' example and relied heavily on the work of others—specifically the regulations previously drafted and used by the Cost of Living Council (CLC)[131] in administration of its Phase IV price controls under the Economic Stabilization Act of 1970.[132] The CLC regulations had been designed to apply to a variety of industries.[133] But the

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[128] Exec. Order No. 11,748, 3 C.F.R. 822 (1973), *revoked by* Exec. Order No. 11,790, 3 C.F.R. 882 (1974).

[129] Mandatory Petroleum Allocation Regulations, 39 Fed. Reg. 1,924, 1,932-49 (1974). For a general history of the implementation of this Act and the beginnings of FEO, see M. WILLRICH, ADMINISTRATION OF ENERGY SHORTAGES 139-40 (1976); PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 9-11; *see also* SPORKIN REPORT, *supra* note 9, app., at A1-A24.

[130] *See, e.g., FEA Hearings, supra* note 121 (testimony of Frank Zarb). According to Mr. Zarb: "FEA confronted an entirely new problem with which none of us had any direct experience. Most of the people involved had little direct knowledge of the energy industry's complexity. We were in a true emergency situation which put a premium on decisive action." *Id.* at 7. *See also Crude Oil Pricing Compliance Problems: Hearings Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 99 (1977) (testimony of David G. Wilson, former Deputy General Counsel of FEA).

Paul Bloom, presently Special Counsel of DOE in charge of enforcement actions against major oil companies, recently observed with respect to the regulations issued to carry out the oil pricing programs that:

> This scheme of regulations was developed literally during emergency conditions, and while it was constructed in good faith, the framers of this regulatory program were unable to enjoy optimal conditions where they could objectively and cautiously construct a complex regulatory package of importance and significance to the United States. . . . In addition, this rather extraordinary and complex program had to be administered by an agency set up as a temporary emergency agency, which therefore had difficulty in obtaining a permanent, highly qualified staff.

Bloom, *Enforcement Procedures for Price Regulation Audits and Overcharges,* 13 TULSA L.J. 715, 716-17 (1978) (footnote omitted).

[131] *See* M. WILLRICH, *supra* note 129, at 181.

[132] Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, *as amended by* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, *as amended by* Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, 87 Stat. 27, *reprinted at* 12 U.S.C. § 1904 note (1976).

[133] *See generally* SPORKIN REPORT, *supra* note 9, app., at A-1.

FEO adopted and applied them to the petroleum industry, initially without much in the way of adaptation or modification.[134]

B. *Administering the Emergency Program*

Many of the problems plaguing the oil enforcement program today are traceable to this emergency incorporation-by-reference approach to legislation and regulation. Congress and the administrators involved drew upon imperfect statutes and rules in shaping the EPAA program that arguably were problematic even when applied to the task for which they were specifically designed—Phase IV of the wage and price control program administered by the Cost of Living Council.[135] Moreover, there was no reason to suspect that this scheme was adequate to handle the different task of regulating the petroleum industry. As a result, the initial substantive regulations issued often were vague and imprecise,[136] and the procedures by which they were to be enforced were exceedingly informal. The fairness of the procedures first used to enforce EPAA regulations was questionable, even for a short-lived emergency program. This question of fairness became even more pronounced as the emergency program gradually became a more permanent part of our regulatory landscape.[137]

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[134] M. Willrich, *supra* note 129, at 181. Robert Montgomery, then General Counsel of FEA, noted that the regulation writers operated in a crisis atmosphere.

"It is important to recognize, during this time period, the embargo was in full swing, and the actions that FEA were taking with regard to its initial regulations were by and large feverish attempts on our part to reconcile the initial regulatory program, notwithstanding everyone's efforts. Thus, our actions were not at all perfect or absolutely consistent with the real world, to the changing situation and to the problems that were developing in certain geographic locations in certain parts of the industry, which in our view required immediate and the most expeditious possible actions." *Congressional Oversight of Administrative Agencies (Federal Energy Administration): Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 5 (1975).

[135] *See* Note, *supra* note 124, at 1669-77.

[136] The result of this process was a set of regulations possessing the immediately discernible characteristic of incomprehensibility. *See* Presidential Task Force Report, *supra* note 18, at 6; Trowbridge, *Enforcement of Criminal Sanctions for Violation of Federal Controls on the Price of Crude Oil and Petroleum Products*, 17 Am. Crim. L. J. 201, 215 (1979).

Though there were attempts to clarify these regulations they often confused matters even more. Major changes were constantly being introduced into the regulations. *See* Longview Ref. Co. v. Shore, 554 F.2d 1006, 1016 n.26 (Temp. Emer. Ct. App. 1977). The result was an enormously complex set of regulations that required a team of lawyers and accountants to understand. *See FEA Hearings, supra* note 121, at 13 (testimony of Gorman C. Smith, Assistant Administrator for Regulatory Programs). Mr. Smith noted that some of the major refiners had lawyers "who [spent] their time analyzing every line and phrase in our regulations," and accountants "who [had] access to the numbers and . . . computerized capabilities," but the refiners still could not ensure compliance because of the difficulty in interpreting the regulations. *Id.*

Much of the recent and past litigation surrounding the enforcement process stems from these unclear regulations. Some courts have suggested that new interpretations of these regulations constitute retroactive rules and cannot be applied to past transactions. *See, e.g.*, Standard Oil Co. v. DOE, 596 F.2d 1029, 1062-63, 1065 (Temp. Emer. Ct. App. 1978).

1. *The Federal Energy Office—The Beginning Stage of the Energy Program*

The EPAA offered little procedural guidance to the Federal Energy Office (FEO), the first agency charged with the responsibility of enforcing this act. FEO relied heavily on procedures used by the Cost of Living Council,[138] and adopted exceedingly informal, and at times abusive, procedures. In *OKC Corp. v. Oskey Gasoline & Oil Co.*,[139] for example, the district court noted a number of irregularities in FEO's enforcement procedures, including:

> presence of an ill disclosed tape recorder; refusal of FEO to swear witnesses; and the unwillingness for FEO to have the proceedings reported by a court reporter. The most serious irregularity in this Court's view is an apparently unsolicited "friendly" ex parte communication from one of the parties to the hearing officer after the hearing. This is a most serious result from FEO's attempt to be informal.[140]

Despite finding irregularities that were unwise, deficient, and a disservice to everyone involved,[141] the court felt "constrained to find that FEO was acting within its lawful authority," and upheld FEO's decision in this case.[142] This case is typical of the hands-off approach applied by courts. The usual rationale was that the temporary emergency nature of the energy program necessitated deference to the agency.[143] In short, the courts did little to correct the legislature's lack of procedural guidance to FEO. The emergency powers of the agency were largely unfettered.[144]

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[137] Oil regulation began in 1970 with the Economic Stabilization Act, Pub. L. No. 91-379, 84 Stat. 79, *reprinted at* 12 U.S.C. § 1904 note (1976). As the authority to issue and enforce orders and regulations under that Act was about to expire in 1974, price regulation on the oil industry was retained with passage of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, § 4(g)(1), 87 Stat. 627. Regulation under this Act should have ended in 1975, but was extended. Enforcement proceedings are expected to carry on past the new termination date in 1981. *See* notes 1-9 and accompanying text *supra*.

[138] *See* Sporkin Report, *supra* note 9, app., at A-10.

[139] 381 F. Supp. 865 (N.D. Tex. 1974).

[140] *Id.* at 869 n.15.

[141] *Id.* at 869.

[142] *Id.*

[143] Elkins, *supra* note 125, at 129 & n.73 (discussing the Temporary Emergency Court of Appeals). *See* Atlantic Richfield Co. v. FEA, 556 F.2d 542, 548 (Temp. Emer. Ct. App.

2. *The Federal Energy Administration—The Middle Years*

Five months after President Nixon established FEO, Congress passed the Federal Energy Administration Act of 1974[145] thereby abolishing FEO and replacing it with the Federal Energy Administration (FEA). This agency was created primarily to ensure the existence of a more elaborate and centralized administrative framework than FEO, outside the office of the President.[146]

Like its predecessor, FEA continued an informal adjudicatory approach in its enforcement proceedings.[147] FEA regulations au-

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1977); Mandel v. Simon, 493 F.2d 1239, 1240 (Temp. Emer. Ct. App. 1974) ("The [allocation] plan must necessarily be considered in light of the fact that the governing statute demanded immediate and extensive regulation of a new and complex area; the program is only in its first month of operation."). The Temporary Emergency Court of Appeals has stated that:

> Where the obvious intent of Congress is to give the President and his delegates broad power to do what reasonably is necessary to accomplish legitimate purposes rendered necessary by a recognized emergency, and regulations are fashioned to implement the Congressional mandate, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate.

Condor Operating Co. v. Sawhill, 514 F.2d 351, 359 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975). Even earlier the court had declared that:

> In light of the emergency nature of the authority delegated to the FEO and the difficulty of its duty to establish complex but fair procedures within a short time, a requirement that it submit any and every amendment to the Attorney General and the FTC would be counterproductive. We do not believe that the Act itself or the legislative history thereof establish such a requirement.

Reeves v. Simon, 507 F.2d 455, 459-60 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

[144] *See, e.g.*, Mode, *Federal Petroleum Regulation in the Courts*, 29 INST. OIL & GAS L. & TAX 39 (1978).

[145] Pub. L. No. 93-275, 88 Stat. 96 (codified at 15 U.S.C. §§ 761-790h (1976)).

[146]
> [W]hen H.R. 11793 [the FEA Act] is enacted into law and the Federal Energy Administration is established, it will supersede and replace the Federal Energy Office, established by Executive Order 11748 . . . .
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> . . . .
>
> H.R. 11793 . . . retains and enlarges upon the combination of policy and administrative responsibilities assigned to the [FEO] Administrator under Executive Order 11748. Because administrative responsibilities are pre-eminent in an emergency, it is appropriate to remove the office from the Executive Office of the President and constitute it an independent agency.

H.R. REP. No. 748, 93d Cong., 1st Sess. 13, 15 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2939, 2951-52.

[147] The continued perception of the emergency nature of the substantive regulatory program generated a feeling that flexibility and speed were needed. The continued exemption from the adjudicatory provisions of the APA allowed for procedural ex-

thorized its office of enforcement to issue a remedial order whenever "any report required by the FEA or any audit or investigation discloses, or the FEA otherwise discovers, that there is reason to believe a violation of any provision of this chapter, or any order issued thereunder, has occurred, is continuing or is about to occur."[148] Under such circumstances, FEA could begin an enforcement proceeding "by serving a notice of probable violation or by issuing a remedial order for immediate compliance."[149] Informal conferences could be requested and were routinely granted.[150] The recipient of the notice bore the burden of proving any inaccuracies in the notice of probable violation. If the recipient failed to convince the prosecutors that the allegations were incorrect, FEA could issue a remedial order.[151] The order consisted of "a written opinion setting forth the relevant facts and the legal basis of the remedial order."[152] It was effective upon is-

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perimentation. *See generally* M. WILLRICH, *supra* note 129, at 184 (FEA exempt from APA adjudicatory hearing requirements). *See also* notes 123-38 and accompanying text *supra*. *But see* 15 U.S.C. § 766(c),(i) (1976) (continued requirement of elaborate rulemaking procedures). These factors militated in the direction of informal adjudicatory procedures even in enforcement cases.

In addition, the FEA initially had a short life expectancy. *See* H.R. REP. NO. 748, 93d Cong., 1st Sess. 2, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2939, 2940. Frank Zarb, an early FEA administrator, pointed out that the short life span of FEA "made it difficult for me and my predecessors to plan and execute an adequate staffing program. It has been hard to plan future requirements and attract fully qualified and dedicated people to an agency that offered very limited job security." 2 SPORKIN REPORT, *supra* note 9, at ii. *See generally* Standard Oil Co. v. FEA, 453 F. Supp. 203, 206 (N.D. Ohio), *aff'd*, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978); Bloom, *supra* note 130, at 716-17. Thus FEA was forced to enter into a Memorandum of Understanding with the Internal Revenue Service (IRS) in which FEA temporarily transferred its enforcement and compliance responsibility to IRS. M. WILLRICH, *supra* note 129, at 193. Professor Willrich has noted that:

> For the period from January 11, 1974, through June 30, 1974, the FEA transferred all compliance and enforcement responsibility for allocation and price regulation to the IRS. IRS assigned 300 investigators to this work. . . . The FEA assumed control of enforcement activities in July with about 850 investigators.

Id. Though FEA eventually regained control of enforcement, the legacy of the IRS investigatory approach, with its emphasis on informal conferences and lack of well defined procedures prior to judicial review, contributed to the development and continuation of FEA's flexible approach to procedure.

[148] 10 C.F.R. § 205.190(b) (1974).

[149] *Id.* A person receiving a notice of probable violation had 10 days to respond. *Id.* § 205.191(b). Failure to do so was treated as a concession of the "accuracy of the factual allegations and legal conclusions stated in the notice." *Id.* § 205.191(f). The response was to be in a writing as full and complete as possible. *Id.* § 205.191(c).

[150] *See generally* 39 Fed. Reg. 32,262 (1974).

[151] 10 C.F.R. 205.192(a) (1974).

[152] *Id. See* Atlantic Richfield Co. v. Zarb, 532 F.2d 1362 (Temp. Emer. Ct. App. 1976).

suance and, though an administrative appeal was provided, appeal of the order did not automatically stay its effectiveness.[153]

If a party took an appeal, FEA regulations required its filing with the Office of Exceptions and Appeals (OEA), an administrative unit within FEA.[154] The procedures used for adjudicating contested orders on appeal also were informal, and full blown evidentiary hearings were seldom granted. As one commentator noted: "Officials in OEA believe that, given the time delays involved, hearings contribute so slightly to improving decisions that they should be used only rarely."[155]

FEA's enforcement procedures were criticized for various reasons. Though administrative enforcement proceedings may threaten severe civil sanctions usually in the form of pay back obligations,[156] FEA's procedures purposefully did not allow for a full evidentiary hearing as a matter of right.[157] Nor was an enforcement action automatically stayed when an administrative appeal was filed.[158] Moreover, it was argued that the process was seriously flawed because: (1) the burden of proof rested on the recipient of a remedial order and it remained on the recipient throughout the administrative enforcement process;[159] (2) ex parte contacts, though not openly encouraged, nonetheless occurred and FEA's regulations did not address this problem;[160] and most important, (3) there appeared to be a combination of prosecutorial and judicial functions within the Office of Exceptions and Appeals (OEA)[161]—all OEA decisions were subject to review by a committee that included representatives from the enforcement wing of the agency.[162]

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[153] 10 C.F.R. 205.192(b) (1974).

[154] *Id.* § 205.195(b). In addition to remedial order appeals, the Office of Exceptions and Appeals was responsible for all applications for exception (*id.* § 205.52), modification or rescission (*id.* § 205.132(a)), and appeals from the denial of such applications as well as appeals from all orders and interpretations issued by FEA's national office (*id.* § 205.103(a)). 205.103(a)).

[155] M. Willrich, *supra* note 129, at 197.

[156] *See* text accompanying notes 306-07, 318-320 *infra*. The statute also provides for criminal and civil penalties. *See* 15 U.S.C. § 754(a)(3) (1976).

[157] *See* Craven, *New Dimension in Federal Regulation of Crude Oil and Petroleum Products under the Department of Energy*, 29 Inst. Oil & Gas L. & Tax. 1, 11 (1978); notes 150 & 155 and accompanying text *supra*.

[158] *See* C.F.R. 205.192(b) (1974); Craven, *supra* note 157, at 12; note 153 and accompanying text *supra*.

[159] *See* 10 C.F.R. § 205.106 (1974); Craven, *supra* note 157, at 12; note 151 and accompanying text *supra*.

[160] *See* Craven, *supra* note 157, at 11 n.42. *See generally* note 140 and accompanying text *supra*.

[161] *See* Craven, *supra* note 157, at 11.

Access to the courts did not cure these problems. District court review of administrative enforcement proceedings was appellate in nature. The Economic Stabilization Act prescribed this kind of district court review for the Cost of Living Council's program, in part to assure easy access to judicial review. The assumption was that, particularly in small cases, it would take the place of appellate review at the circuit level.[163] This type of review may have had some justification for the 1970 wage and price control program, but Congress incorporated it by reference into the Federal Energy Administration Act with little apparent thought. Other alternatives—either eliminating district court review altogether or recasting it in the more familiar mold of an independent factfinder developing a complete record de novo—may have been preferable. As it was, both the district court and the Temporary Emergency Court of Appeals had to rely on the record developed by FEA.[164]

3. *Administering the Oil Program Under the Department of Energy Organization Act of 1977*

Section 503 of the DOE Act was devised primarily to meet many of the criticisms made of FEA's remedial order procedures. Though this provision resolved some of the earlier problems, its success was by no means complete.

a. *FERC Review*. The DOE Act authorized review of executive remedial orders by the Federal Energy Regulatory Commission.[165] By granting such power to an independent agency not involved in the enforcement of the oil program in any way, Congress was able to meet one of the major criticisms of the old scheme: the apparent combination of enforcement and judicial functions within the old Office of Exceptions and Appeals. Further, FERC review of executive orders dealing with oil pricing matters is consistent with another overall goal of FERC review—checking executive power.[166]

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[162] *See id.*; notes 150-56 and accompanying text *supra*.

[163] *See* note 125 *supra*.

[164] *See id.*

[165] The legislative history makes clear that the primary purpose of § 503 of the DOE Act was to "assure that the Department's review of any initial action . . . will be by officials who in no way were involved in the Department's original action. *This guarantees a separation of the prosecutorial and judicial functions relating to enforcement*." H.R. Rep. No. 539, 95th Cong., 1st Sess. 85, *reprinted in* [1977] U.S. Code Cong. & Ad. News 925, 956 (emphasis added).

Beyond such structural changes, the DOE Act corrected deficiencies in FEA procedures as well. Section 503 of the DOE Act explicitly provides for the granting of stays of remedial orders unless "the Commission finds [that] the public interest requires immediate compliance with such remedial order."[167] More important, the new Act provides a right to a hearing which must include, "at a minimum, the submission of briefs, oral or documentary evidence, and oral arguments."[168] Though the new Act guarantees a hearing, a full evidentiary hearing is not guaranteed as a matter of right.[169] Congress sought to correct the abuses of the past, but it also sought to preserve the flexible procedural approach that evolved during the emergency phase of this program. As Congressman Eckhardt, the sponsor of the new Act's procedures, noted:

> We do not grant quite as many procedural safeguards to the person subjected to agency action as does [*sic*] sections 554 and 556 of the Administrative Procedure Act: but [the new Act] does give the right to a person to have an oral hearing, gives him an opportunity to contest the agency position and gives him a record on which a court may ultimately determine whether the agency decision was based substantially on the record as a whole. No such procedures are now provided.[170]

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[166] *See generally* text accompanying notes 92 & 93 *supra*.

[167] 42 U.S.C. § 7193(c) (Supp. I 1977).

[168] *Id.*

[169] *Id.* It can be argued, however, that § 503's requirement in § 503 of "an opportunity for a hearing" triggers §§ 554, 556, 557 of the APA. *See, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33, *modified*, 339 U.S. 908 (1950); United States v. Florida E. Coast Ry., 410 U.S. 224 (1973). This argument has been rejected by Professor Byse, who pointed out that:

> [S]ection 5 of the Emergency Petroleum Allocation Act of 1973 exempts remedial orders from the adjudicative provisions of the APA. Accordingly when Congress added the remedial order amendment to the DOE bill, it was working in a context of an exemption from the APA. Rather than simply deleting the exemption or providing that sections 554-557 should apply to remedial orders . . . the amendment provided for a "hearing" and then identified certain of the ingredients of the hearing. This is a strong indication that the proposed amendment was to give recipients of remedial orders the procedural safeguards contained in the amendment rather than those contained in the APA. I agree with Representative Eckhardt that the adjudicative provisions of the APA are not applicable to remedial order procedures.

Byse, *supra* note 38, at 222 (footnotes omitted). *See also* text accompanying note 170 *infra* (statement of Rep. Eckhardt).

[170] 123 Cong. Rec. H5,372 (daily ed. June 3, 1977). Pursuant to § 503 of the DOE Act FERC can grant full-blown evidentiary hearings. Section 503 does not, however, explicitly

b. *The Executive Response*. If the FERC procedures mandated by the DOE Act alone controlled in enforcement proceedings, they would constitute an adequate procedural framework for the task at hand.[171] But the procedural issues surrounding the enforcement process are more complex because of the executive's reaction to FERC's statutorily mandated role. Congress failed to specify the precise procedural relationship between DOE's executive wing, which issues remedial orders, and FERC, which reviews them; the legislature provided only that the Secretary was not precluded from developing procedures prior to or incident to initial issuance of a remedial order[172] by the Office of Hearings and Appeals (OHA), successor to FEA's Office of Exceptions and Appeals. Given FERC's mandatory procedural safeguards, minimal executive procedures for this issuance process would have sufficed. Instead, an elaborate set of issuance procedures has been developed on OHA's behalf almost as if the executive wing was oblivious to the existence of the FERC review process. The net result is a set of procedures at OHA that resembles the minimal procedures section 503 of the DOE Act requires FERC to provide.

This redundancy began when the Economic Regulatory Agency (ERA), an executive agency charged with the enforcement of the EPAA,[173] acting on behalf of OHA, issued an elaborate set

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provide for the use of administrative law judges. Furthermore, it is interesting to note that the linguistic approaches of the APA and the DOE Act differ significantly. The APA places emphasis on the rights of the litigant. Section 556 of the APA states that "a party is entitled to present his case or defense by oral or documentary evidence, [and] to submit rebuttal evidence." 5 U.S.C. § 556(d) (1976). Section 503 of the DOE Act, however, emphasizes the Commission's discretion. Thus, "[t]he Commission shall, upon request, afford an opportunity for a hearing, including, at a minimum, the submission of briefs, oral or documentary evidence, and oral arguments." 42 U.S.C. § 7193(c) (Supp. I 1977).

[171] *See* note 168 and accompanying text *supra*.

[172] DOE Act of 1977, Pub. L. No. 95-91, § 503(e), 91 Stat. 590 (codified at 42 U.S.C. § 7193(e) (Supp. I 1977)), *as amended by* the Powerplant and Industrial Fuel Use Act of 1978, 95-620, § 805(b), 92 Stat. 3348. Section 503 presently provides that:

> Nothing in this section shall be construed to affect any procedural action taken by the Secretary prior to or incident to initial issuance of a remedial order which is the subject of the hearing provided in this section, but such procedures shall be reviewable in the hearing.

42 U.S.C. § 7193(e) (Supp. I 1977).

[173] As noted earlier (*see* text accompanying notes 110-13 *supra*), the Economic Regulatory Agency is the primary executive unit under the Secretary of Energy. It has, in effect, taken over the duties of the old Federal Energy Administration. The Office of Hearings and Appeals was initially placed within ERA. This Office, in effect, replaces the Office of Exceptions and Appeals which previously handled, among other things, adjudication of contested remedial orders.

of procedures "to provide a fuller administrative review of the issues raised in each remedial order prior to the issuance of the order in final form."[174] Enforcement proceedings still begin by serving the alleged violator with a notice of probable violation (NOPV),[175] and an alleged violator may request an informal conference.[176] Up to this point, these provisions make a good deal of sense. They provide the government and an alleged violator an opportunity to discuss the case, define the issues, and possibly settle the dispute.[177] This is not, however, the extent of the executive's remedial order procedures. If the parties fail to settle the dispute at the informal conference stage, more elaborate adjudicatory proceedings begin before OHA.[178]

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[174] 43 Fed. Reg. 3,995 (1978).

[175] Administrative Procedures and Sanctions, 10 C.F.R. § 205.191(a) (1979). NOPV's may be issued either by ERA's national Office of Enforcement, ERA's Office of Special Counsel or by regional ERA enforcement offices. Within 30 days of service of the NOPV, the recipient may file a written reply containing "a statement of all relevant facts pertaining to the act or transaction that is the subject of the Notice of Probable Violation." *Id.* § 205.191(c). In addition, "the reply shall include a discussion of the relevant facts pertaining which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE or its predecessor agencies." *Id.* § 205.191(d).

If a reply is not filed, a firm "shall be deemed to have admitted the accuracy of the factual allegations and legal conclusions stated in the Notice of Probable Violation, and the ERA may proceed to issue a Proposed Remedial Order." *Id.* § 205.191(f). Thus, a litigant cannot choose to ignore a NOPV. Failure to reply to a NOPV will result in a proposed remedial order (PRO) and most likely a claim that there was a failure to exhaust administrative remedies, should the litigant choose to contest the PRO.

[176] *Id.* § 205.191(e). If the reply to the NOPV and conference fail to convince the enforcement staff that an order should not be issued, a proposed remedial order (PRO) may be issued by ERA. *Id.* § 205.192(b). The PRO must set forth the proposed findings of fact and conclusions of law upon which it is based. In addition, "[i]t shall also include a discussion of the relevant authorities which support the position asserted, including rulings, regulations, interpretations and previous decisions issued by DOE or its predecessor agencies." *Id.* § 205.192(d). Within 20 days after service of the PRO, ERA can supplement this order with further "information relating to the calculations and determinations which support the findings of fact set forth in the Proposed Remedial Order." *Id.* § 205.193A. At this stage of the proceeding, ERA has the burden of establishing a prima facie case against an alleged violator. This burden is met, however, "by the service of a Proposed Remedial Order that meets the requirements" set forth above. *Id.* § 205.192A(a).

A copy of the PRO must be served on the alleged violator and a notice of the proposed order must be published in the Federal Register. A copy of this notice is then mailed by ERA "to all readily identifiable persons who are likely to be aggrieved by issuance of the Proposed Remedial Order as a final order." *Id.* § 205.192(c). "Within 15 days after publication of the notice . . . in the FEDERAL REGISTER, any aggrieved person may file a Notice of Objection." *Id.* § 205.193(a).

Once a PRO is issued, all further proceedings take place before the Office of Hearings and Appeals. As the regulations state, "[i]n order to exhaust administrative remedies with respect to a Remedial Order proceeding, a person must file a timely Notice of Objection and Statement of Objections with the Office of Hearings and Appeals." *Id.* § 205.193(f).

Upon receipt of a Notice of Objection, the Office of Hearings and Appeals must publish a notice in the Federal Register. This notice sets forth the basic outline of the PRO and states that any person who wishes to participate in the proceedings must file an appropriate request with OHA within 20 days after publication. Based on the response to this notice, OHA then prepares an official service list. *Id.* § 205.194.

Within 40 days of service of a Notice of Objection, the contestant must file a Statement of Objections. *Id.* § 205.196. This is intended to be a very detailed response to the PRO and a thorough discussion of the contestant's case. Any participant, including the ERA Office of Enforcement, may file a response within 30 days of receipt of the objections. *Id.* §

Viewed in isolation—without regard to the FERC hearing requirements imposed by section 503—the adjudicatory procedures developed by OHA represent a substantial improvement over those used by FEA. For example, unlike FEA remedial orders, which were subject to review by internal committees that included members of the enforcement section of FEA,[179] OHA remedial orders are specifically excepted from such internal committee review.[180] In addition, OHA regulations provide for stays of its orders,[181] have a provision prohibiting ex parte contacts,[182] place the burden of proof on the government,[183] and provide at least

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205.197. At the same time a party files a Statement of Objections, a motion for an evidentiary hearing may be filed (*id.* § 205.199) and a motion for discovery must be filed (*id.* § 205.198).

[177] If the parties fail to settle the case at this stage, one possible approach might have been for the ERA Office of Enforcement simply to issue a remedial order which, if it were contested, would then trigger a hearing at the FERC. The general DOE Act procedures outlined in § 503 would then apply. This approach would have eliminated the adjudicatory stage at OHA.

[178] *See generally* 10 C.F.R. §§ 205.191-192 (1979).

[179] *See* Craven, *supra* note 157, at 11; text accompanying notes 157-62 *supra.*

[180] DOE Order No. 1100.3 (Sept. 15, 1978). As this order makes clear, a review committee is still in existence; however, it stated: "The Office of Hearings and Appeals shall be the decisionmaker with respect to the review of Proposed Remedial Orders. . . ." *Id.* at 5. Other orders, such as exceptions, for example, can be issued only after "the Director of the Office of Hearings and Appeals shall obtain the unanimous concurrence of the Administrative Review Committee." *Id.* at 4. This Committee consists of the Director of OHA, the General Counsel, and any officer that has primary responsibility for the subject matter involved. *Id.* To the extent that the General Counsel's involvement with the exceptions process may affect or influence the outcome of a particular enforcement case, it may also be appropriate to prohibit participation by this office in such proceedings.

In effect, OHA has been playing a role similar to that envisioned for the proposed Board of Hearings and Appeals—that of an in-house energy court. The Secretary's delegation order to the director of OHA vests in OHA broad adjudicatory powers. Similar to the jurisdictional grant to the proposed Board, this order provides that OHA shall review and issue "all final DOE orders of an adjudicatory nature in accordance with Departmental regulations and procedures, other than those orders involving matters over which . . . [FERC] exercises jurisdiction, or those matters within the jurisdiction of the Board of Contract Appeals." *Id.* at 1.

[181] 10 C.F.R. § 205.199D(h) (1979).

[182] *Id.* § 205.199F.

[183] *Id.* § 205.192A(a).

the opportunity for an evidentiary hearing if the agency determines that this is necessary.[184]

Organizational changes also have been made. OHA is no longer within the Economic Regulatory Agency. Rather, it is directly responsible to the Secretary of Energy.[185] This organizational change was made in response to criticism that even with OHA's more elaborate procedures, a separation of powers problem remained. OHA was a part of the Economic Regulatory Agency. This agency was charged with enforcement of the Emergency Petroleum Allocation Act. Members of OHA were, in effect, working for the chief enforcement officer of the department, the head of ERA.

Placing OHA under the Secretary for organizational purposes does not completely eliminate this "problem." The Secretary of Energy, of course, supervises both the director of OHA and the director of ERA. To that extent, OHA is not as independent of the enforcement process as the initially proposed Board of Hearings and Appeals would have been. Nevertheless, the internal separation of functions that now exists within the Department clearly satisfies the dictates of the due process clause and is similar to adjudication in other executive agencies.[186]

The question of OHA's procedures, however, cannot be viewed in isolation. The fact is that section 503 of the DOE Act requires FERC to provide substantially the same procedures after the OHA proceedings. The net result is two sets of adjudicatory procedures.

c. *FERC Review Procedures*. FERC has attempted to minimize this procedural duplication while complying with its statutory mandate to review DOE remedial orders by reserving its right in appropriate cases to rely on the record developed by OHA. Thus, FERC has not interpreted section 503 to require a de novo hearing when OHA "proposed remedial orders" are contested.[187] Rather, the FERC's regulations establish it as a flexible appellate court—one capable of reviewing a record made elsewhere, but also capable, without remand, of supplementing that record, when necessary.[188] The Commission's regulations provide, under certain limited circumstances, an opportunity to present new evidence to the Commission as well as to contest portions of the executive record;[189] however, one contesting a remedial order must make his initial stand at OHA, not the Commission.[190] When the case comes to the Commission, it must provide "independent scrutiny" of the record, but not necessarily allow for further evidentiary proceedings. As the preamble to the regulations makes clear:

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[184] *See* notes 308-09 and accompanying text *infra*.

[185] *See* DOE Order No. 1100.3, at 1 (Sept. 15, 1978).

[186] *See* note 241 *infra*.

[187] Summary of the Commission's Final Regulations, 43 Fed. Reg. 52,219, 52,223 (1978).

[188] Commission Review of Remedial Orders, 18 C.F.R. § 1.38(g) (1979).

> A separation of the judicial and prosecutorial functions is accomplished by Commission review supplemented by limited evidentiary proceedings where necessary. . . . [T]he extension of due process is satisfied in many cases by an *independent scrutiny* of the record and by less than a de novo proceeding, so long as each side has been afforded an opportunity to present its case in full.[191]

It is a close question whether the Commission's procedures satisfy Congress' intent as embodied in the DOE Act;[192] providing

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[189] *Id.* § 1.38(f)(2)(ii)(A).

[190] Administrative Procedures and Sanctions, 10 C.F.R. § 205.199C (1979).

[191] Summary of the Commission's Final Regulations, 43 Fed. Reg. 52,219, 52,223 (1978) (emphasis added).

[192] It has been forcefully argued that the Commission must provide a de novo hearing and cannot rely on the OHA record in any way. *See, e.g.*, Carlson, FERC Review of Remedial Orders (Dec. 6-7, 1978) (summary paper presented at Executive Enterprises Briefing on DOE Exceptions, Enforcement and Litigation, New Orleans, La.) (on file at *Cornell Law Review*) (arguing that § 503 requires a de novo hearing and FERC should conduct *all* of its own fact-finding). Several arguments are made. At one point during consideration of the DOE Act, the House proposed that the review of remedial orders should be placed in ERA. Congress, however, explicitly rejected this option and chose to place the review function with FERC. *Id.* at 3-4. In so doing, it can be argued that:

> Congress made clear that an evidentiary hearing was to be held after, not before, issuance of a remedial order and that the hearing was to be before an independent decision-maker. It would not appear that this requirement could be satisfied by an arrangement which precludes an independent adjudicator from taking the evidence and observing and judging the demeanor and credibility of witnesses, an opportunity denied by reliance upon the record developed before the Secretary.

Id. at 8-9.

Second, it also has been argued that the explicit requirements of § 503 "are 'trial' functions, not appellate functions." That is to say, § 503 "provides for an opportunity to submit oral and documentary evidence and to cross-examine witnesses." Moreover, it implicitly "places the burden of proof on the Secretary and requires that the Commission make its own affirmative findings of fact." *Id.* at 9. It is noted in the summary to the Commission's regulations that the Commission must give "independent scrutiny" to the facts *initially* found by OHA. *See* note 191 and accompanying text *supra*.

Third, it is argued that the legislative history of § 503 proves that in placing hearing responsibilities in the Commission, the Congress ordered "a clean separation of prosecutoan opportunity for "independent scrutiny" of OHA factfinding and, on occasion, cross-examination and the submission of new facts and issues arguably satisfies the primary purpose of the DOE Act's mandate, at least in theory. In practice, however, FERC's backlog of cases and the scarcity of its own resources may result in substantial reliance on OHA in most cases,[193] and much less "independent scrutiny" than might be desired.

d. *The Administrative and Judicial Gauntlets*. Though greater and indeed even extensive reliance on OHA factfinding will minimize some of the procedural duplication that now is possible, it cannot eliminate repetition. Given OHA's issuance procedures as well as the minimum procedural requirements imposed on FERC, at least five separate stages of the administrative process precede issuance of a final remedial order. Three levels of appellate judicial review may then follow.

The administrative process begins with the issuance of a notice of probable violation by a regional Office of Enforcement.[194] This triggers a set of informal procedures aimed at settlement or clarification of the charges.[195] A second round of informal procedures is triggered at the federal level if a proposed remedial order is issued and contested.[196] If the matter is not settled at that level and a motion for an evidentiary hearing has been filed, a third, more formal stage within the executive branch begins at OHA.[197] While an evidentiary hearing in the APA sense is not likely,[198] a full evidentiary hearing is theoretically pos-

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rial and judicial functions." Carlson, *supra*, at 9. Senator Javits, the Senate sponsor of § 503, stated that this section would "require that the Secretary exercise the executive functions of investigating and prosecuting administrative violations, but that the [Commission would] exercise the quasi-judicial function of determining whether in fact the violation has occurred." 123 CONG. REC. S7,668 (daily ed. May 16, 1977). Moreover, Javits also stated that "the corporation charged may have a factual hearing upon the evidence [before the Commission], with the right of cross-examination, et cetera, instead of depending upon the record, which the agency itself may make as the basis for the appeal, which can then be decided only on the substantial evidence rule." *Id*. S7,935 (daily ed. May 18, 1977). He also recognized that the placement of decision-making responsibilities in the Commission "would put all . . . original hearings in the same forum resulting in consistency and the development of administrative expertise." *Id*. S7,668 (daily ed. May 16, 1977).

[193] For a discussion of FERC's backlog and a suggested solution by the natural gas industry, see Lawrence & Muchow, *The FERC's Case Load Management Problem*, PUB. UTIL. FORT. Jan. 18, 1979, at 9-15.

[194] *See* note 175 *supra*.

[195] *See* note 176 *supra*.

[196] *See id.*

[197] *See* note 178 and accompanying text *supra*.

[198] As will be explored later, OHA hearings differ from conventional APA adjudication in two primary ways: administrative law judges are not used and material issues of disputed facts do not necessarily trigger an *oral* evidentiary hearing.

sible.[199] If the alleged violator continues to protest, the stage shifts to the independent FERC. A "presiding officer" at FERC can hear the case de novo if he feels it is necessary. But even if he relies fully on the record developed at OHA, there is at a minimum an opportunity for oral argument, briefs and, possibly, some new testimonial evidence.[200] The opinion rendered by this presiding officer then goes to FERC for review. FERC then issues a final remedial order which only then may be appealed to the federal courts.[201]

The appeals route through the federal judiciary is nearly as laborious as the administrative process. The DOE Act retained the judicial review provisions of the Economic Stabilization Act.[202] Thus, judicial review continues to begin with district court review of FERC orders. The review, however, is appellate rather than de novo.[203] Decisions rendered by the district court are then appealable to the Temporary Emergency Court of Appeals.[204] Following a decision by this court, a writ of certiorari lies with the Supreme Court. Mercifully, no enforcement cases have, as yet, progressed so far.

When President Carter referred to the "almost unbelievable" federal bureaucracy that has grown up around oil controls, he surely was referring, at least in part, to this administrative and judicial gauntlet.

III

STRUCTURAL RECOMMENDATIONS

The evolution of the administrative and judicial gauntlets that presently characterize the DOE oil enforcement process raises important structural and procedural issues. Part III focuses on the structural issues and sets forth specific recommendations applicable to the Department of Energy for the remainder of its oil pricing program. To put these structural issues in some perspective, however, it is useful to begin by examining briefly the evolving role of administrative agencies in general and the increasing skepticism that now surrounds them.

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[199] In any event, OHA does provide for a hearing consisting, at a minimum, of oral argument plus an opportunity to submit documentary evidence and extensive briefs. *See* Administrative Procedures and Sanctions, 10 C.F.R. § 205.199-.199A (1979).

[200] *See* text accompanying note 170 *supra*.

[201] 42 U.S.C. § 7193(c) (Supp. I 1977).

[202] *See* note 125 *supra*.

[203] *See id.*

[204] *See id.*

A. *Administrative Agencies, Congress, and the Regulatory Dialogue*

The administrative process has become a "surrogate political process."[205] Administrative agencies cannot be viewed simply as a means by which clear congressional policies are more fully developed, fine-tuned and then implemented. For a variety of reasons, not the least of which is the ambitious nature of much of today's regulation, congressional delegations of legislative power to administrative agencies often are vague, amorphous provisions that provide little in the way of substantive guidance to the agencies involved.[206] As a consequence, agencies represent a distinct and often quite independent voice in the regulatory dialogue that ensues among Congress, the courts, the agency and the affected public.

A variety of procedural safeguards such as those embodied in the APA[207] have developed to check agency power and to ensure that the exercise of this power is reasoned and fair. Moreover, the undemocratic aspects of agency power have been at least partially tempered by the decline of such doctrines as standing and intervention as barriers to participation in the administrative process. As Professor Stewart has noted, the traditional model of the administrative agency has given way to an interest representation model, an essential element of which is "fair representation of a wide range of affected interests in the process of [an] administrative decision."[208]

The administrative process, however, also has been increasingly affected by a growing distrust of government in general and increased antipathy towards administrative agencies in particular.[209] Clean air, clean water, worker safety, a healthy environment, abundant but reasonably priced energy, safe nuclear power, in short a relatively risk free, yet economically affluent society are noble legislative goals. But there is growing skepticism over the ability of traditional New Deal regulatory approaches and bureaucracies to attain them, an increasing awareness of the often harsh political and economic tradeoffs their accomplishment requires and, more fundamentally, an overall lack of consensus over what the costs of these goals may be, who should bear these costs, and, in some cases, over what the actual goals should, in fact, be.[210]

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[205] Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975).

[206] As Professor Stewart has noted:

> The factors responsible for this lack of specificity are (1) the impossibility of specifying at the outset of new governmental ventures the precise policies to be followed; (2) lack of legislative resources to clarify directives; (3) lack of legislative incentives to clarify directives; (4) legislators' desire to avoid resolution of controversial policy issues; (5) the inherent variability of experience; (6) the limitations of language.

Stewart, *supra* note 205, at 1677 n.27. *See generally* T. LOWI, THE END OF LIBERALISM 92-126 (2d ed. 1979); Freedman, Book Review, 43 U. CHI. L. REV. 307 (1976).

[207] 5 U.S.C. §§ 551-559 (1976). With regard to the problems inherent in broad delegations of power by Congress to administrative agencies and the role of procedural safeguards, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 207-08 (2d ed. 1978).

[208] Stewart, *supra* note 205, at 1670.

The skepticism concerning traditional government responses to perceived problems in general and administrative action in particular has increased Congress' participation in the dialogue. This is reflected by its willingness to increase the number and variety of checks on agency power from both outside and within agency walls. Currently, there are, for example, sunset laws,[211] legislative veto provisions,[212] and proposed requirements that agencies perform elaborate regulatory analyses before they issue regulations.[213] In addition, there is an increased willingness on the part of Congress to intervene directly in the affairs of a particular agency, such as the Federal Trade Commission, when that agency engages in activities that are arguably within its authority, but not politically acceptable.[214] At least one house of Congress has also voted to remove the presumption of validity that attaches to agency rules under judicial review.[215] All these examples are illustrative of increased congressional distrust of bureaucratic power and the political appeal of attempting to exert more direct control over bureaucracies and their policies. Given the undemocratic character of administrative agencies, such measures can also be viewed as legitimate attempts to ensure at least a minimum level of political accountability and responsiveness on the part of bureaucracies. But the cumulative effect of these approaches and the potentially paralyzing effect they can have on agency initiative and action may be indicative of a deeper, more substantive concern—the disintegration of any consensus about the wisdom of and need for the specific substantive missions of the agencies involved.

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[209] *See generally* J. FREEDMAN, CRISIS AND LEGITIMACY 259-66 (1978).

[210] This is particularly true in the case of energy. *See* note 38 *supra*.

[211] For example in the Federal Energy Administration Act Congress provided for the demise of the FEA by June 30, 1976. *See* note 25 *supra*. Various bills have from time to time been proposed that would impose sunset laws on all or many federal agencies. *See, e.g.*, S. 3318, 94th Cong., 2d Sess. (1976) (proposing termination of several agencies, including CAB, FAA, OSHA, FEA, ICC, and FMC); S. 2, 95th Cong., 1st Sess., 123 CONG. REC. 496 (1977) (requiring authorizations of new budget authority for programs every 5 years and periodic review of those programs). *See generally* Vidas, *The Sun Also Sets: A Model for Sunset Implementation*, 26 AM. U.L. REV. 1169 (1977).

[212] For an analysis of veto provisions, see Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

[213] *See, e.g.*, S. 2147, 96th Cong., 1st Sess. §§ 602, 603, 125 CONG. REC. S19,040 (daily ed. Dec. 18, 1979). This bill to amend the APA would require elaborate analyses of the need for regulations before rulemaking could commence.

[214] Both the House and the Senate recently have included elaborate procedural provisions in FTC appropriation bills. *See* H.R. 2313, 96th Cong., 1st Sess. (1979) (passed on Nov. 27, 1979, as amended by voice vote on Feb. 7, 1980) and S. 1991, 96th Cong., 2d Sess., 126 CONG. REC. S1,074 (daily ed. Feb. 6, 1980) passed as S. 2313, 96th Cong., 2d Sess., 126 CONG. REC. S1,242 (daily ed. Feb. 7, 1980), on Feb. 7, 1980). These bills contain

The evolution of the structure of the Department of Energy is consistent with, and in large part the result of, both the increasing trend toward distrust of bureaucratic power in general and the overall lack of consensus concerning the substantive mission and goals of agencies in particular. The structural result is, in many ways, the logical extension of the basic premise that the administrative process has become a surrogate political process—an agency which, at least with regard to oil policy, begins to resemble our own tripartite form of government and the constitutional system of checks and balances inherent in this approach. As noted above, the DOE consists of an executive department whose power is offset by FERC, an independent commission. Due to its power to exercise a Commission veto over various secretarial

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elaborate regulatory analysis provisions, separation of functions requirements, and a legislative veto provision. They also effectively terminate one adjudicatory proceeding under way at the FTC and jeopardize a number of other rulemaking and investigatory proceedings. These bills have gone to conference but a final product has yet to emerge. The Administrative Conference has opposed this approach. Administrative Conference of the United States, Resolution Concerning Congressional Termination of Pending Administrative Proceedings at the Federal Trade Commission (adopted Dec. 14, 1979) (to be codified in 1 C.F.R.).

[215] For a formulation of what has come to be known as the Bumpers Amendment, see S. 2408, 94th Cong., 1st Sess. (1975). This amendment would amend § 706 of the APA (5 U.S.C. § 706 (1976)), so as to abolish the presumption in favor of the validity of agency rules and regulations challenged in court. For recent formulations of this amendment see S. 86, 95th Cong., 1st Sess., 123 Cong. Rec. S286 (daily ed. Jan. 10, 1977); S. 111, 96th Cong., 1st Sess., 125 Cong. Rec. S410 (daily ed. Jan. 23, 1979). The Administrative Conference of the United States has opposed this amendment. *See* Administrative Conference of the United States, Recommendation 79-6, Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, As Exemplified by the Bumpers Amendment (adopted Dec. 14, 1979) (to be codified in 1 C.F.R.).

rules, FERC's role is akin to that of Congress when it exercises its legislative veto powers; due to its power to review certain executive adjudications, de novo if it so chooses, FERC is, in effect, an in-house judiciary, separate and distinct from the executive branch of the agency.

B. *The Problems and Sources of DOE Structure*

There are a variety of reasons why the efficacy of such a structural model should be seriously questioned. Significant practical problems emerge. Dividing power between separate branches of the agency government results in jurisdictional ambiguities,[216] and can thus encourage procedural duplication[217] as well as substantial policy fragmentation.[218] These practical problems, how-

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[216] *See* text accompanying notes 73-98 *supra*. The DOE Act has divided authority between the executive wing of the agency and the FERC in ways which often make the jurisdiction of either agency unclear. The control of imports and exports of natural gas is one such example (*see* notes 86-87 *supra*), as is the setting of curtailment priorities and the making of curtailment plans (*see* notes 84-85 *supra*). Similarly, FERC's authority to review secretarial action that affects its jurisdiction fails to define clearly what kinds of actions affect FERC and fall into the reviewable category. Indeed, if FERC were to interpret this mandate very broadly, its veto power could paralyze the Secretary. Happily this has not yet happened. For example, FERC has recently indicated that certain proposed regulations do not significantly affect FERC functions: "[T]he Federal Energy Regulatory Commission received a copy of the proposed rulemaking and has notified the ERA that it has not determined that the proposed regulation would significantly affect any function within its jurisdiction." Incentive Prices for Newly Discovered Crude Oil, 44 Fed. Reg. 25,828, 25,829-30 (1979).

[217] *See* text accompanying notes 193-94 *supra*.

[218] Dividing jurisdiction over important matters (*see* note 216 *supra*), as well as giving FERC review power over certain proposed secretarial rules and orders (42 U.S.C. § 7174 (Supp. I 1977)), can lead to a clash of two distinct views on policy matters. FERC has played an active role in reviewing secretarial rules in some instances. *See, e.g.*, Petroleum Allocation Regulations—Revision for Propane and Other Natural Gas Liquids, 44 Fed. Reg. 60,638 (1979); Motor Gasoline Decontrol and Transition Regulation, 43 Fed. Reg. 14,491 (1978). Thus, though there may be policy conflict, it can be resolved either by issuing a rule acceptable to the Commission or issuing no rule at all.

Other opportunities for policy fragmentation exist when FERC reviews OHA remedial orders and exceptions. Since very few cases have been presented to both OHA and FERC, it is difficult to assess in any complete way the actual impact of the FERC review on executive price-control policy at this time. To date, 16 appeals of OHA remedial orders have been docketed at FERC. *See* DOE Memorandum on OHA RO cases Appealed to FERC from Floyd Robinson to Tony Miles, Assistant General Counsel (Jan. 9, 1980) (on file at *Cornell Law Review*). Only one remedial case has been decided by FERC. *See* Chester F. Dolley and Atlantic Oil Co., No. RO79-3 (FERC Feb. 12, 1980) (summary affirmance of presiding officer's proposed order). Similarly, only one case concerning an exception has been decided. *See* Lunday-Thagard Oil Co., [1979] 6 En. Mngm't (4 DOE) ¶82,506 (Nov. 16, 1979) (affirming in part and reversing in part OHA's proposed decision).

For a study of an analogous split that developed over the policy differences between the Secretary of Labor and the Occupational Health and Safety Commission, see Sullivan, ever, are ultimately less significant than the underlying reasons that account for them—Congress' approach to energy administration legislation.

Historically, Congress has tended to resist bureaucratic reorganizations aimed at increasing executive power and control over vital national programs.[219] The creation of the Department of Energy is a particularly good example of congressional antipathy toward executive power. The uncertainty over the precise substantive energy policies actually favored by the executive, coupled with the lack of consensus within Congress itself over the underlying causes of the energy crisis[220] exacerbated Congress' distrust of executive power in general, and the substantive role of the proposed new agency in particular.

Rather than resolving substantive issues first, Congress, along with the administration, chose to establish a new super agency. In effect, creation of the Department of Energy institutionalized the existing energy crisis. The unresolved substantive controversies and ambiguities simply were transferred to DOE. In the process, these unresolved conflicts underlay much of the debate over the structure of the new department and motivated many of the internal checks and balances built into the agency.

Questions of substance logically should precede questions of agency structure. This is particularly true when, as in the case of energy pricing regulation, the fundamental substantive question is whether there should be any regulation at all. Once such fundamental questions have been resolved, substantive disagreement is, perhaps, less likely to politicize the design of agency structure.[221] Indeed, a new administrative structure may not be needed at all. In any event, if substantive issues are resolved first, at least the general powers to be wielded by the agency would be clearer, and a structure and procedures appropriate for the regulatory tasks at hand could more easily be created.[222]

Independent Adjudication and Occupational Safety and Health Policy: A Test for Administrative Court Theory, 31 AD. L. REV. 177 (1979). *See generally* Currie, *OSHA*, 1976 AM. B. FOUNDATION RESEARCH J. 1107. Professor Currie notes that since a judicial commission necessarily has a certain policymaking character, it should have been given rulemaking authority: "[T]o give rulemaking authority to the Secretary is not to unify but to divide the power to make interstitial policy." *Id.* at 1116.

[219] *See* Karl, *Executive Reorganization and Presidential Power*, 1977 SUP. CT. REV. 1.

[220] *See* text accompanying notes 38-40, 91-93 *supra*.

[221] *See also* Scalia, *supra* note 14, at 402.

[222] Of course, even if the major substantive questions have been resolved, agency structure and procedure may still be susceptible to manipulation by the losers of the substantive

Attempts to soften or, perhaps, thwart the implementation of potentially controversial substantive legislation by building complex procedural protections into the agency administering the program only postpones substantive conflict. It does not aid in its resolution. Moreover, the resulting structure of DOE creates a risk of significantly contributing to administrative paralysis. Congress may have been unwilling or unable to decide what an appropriate energy policy should be, but setting up a complicated and fragmented agency did little to ensure that the new department would efficiently carry out whatever policies ultimately emerged. For DOE, it was virtually inevitable that the organizational structure should be a procrustean bed on which substantive energy policy presently rests most uncomfortably.[223]

C. *Reorganization or New Alliances—The Problems of Administrative Duplication*

In addition to the extensive checks and balances built into DOE, Congress created an organization arguably prone to the development of duplicative procedures in the parallel operations of the commission and the agency.[224] The extensive issuance procedures developed by the Office of Hearings and Appeals are

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battles. But with at least a basic policy direction in mind, attempts at using procedure to thwart a substantive program would be more apparent and more easily defeated.

[223] Woodrow Wilson's criticism of our constitutional system of checks and balances may be particularly appropriate when applied to the internal workings of an administrative agency.

> The trouble with the theory [of checks and balances] is that government is not a machine, but a living thing . . . . No living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Government is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose. Their cooperation is indispensable, their warfare fatal. There can be no successful government without leadership or without the intimate, almost instinctive, coordination of the organs of life and action. This is not theory, but fact, and displays its force as fact, whatever theories may be thrown across its track.

W. Wilson, Constitutional Government in the United States 56-57 (1908).

Of course, it should also be noted that structuring an agency so as to allow for a Commission veto of an executive rule ensures that there be a check on such power in the event that one-house legislative veto provisions prove to be unconstitutional, impractical, or both. For a discussion of various legislative veto provisions, see generally Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977).

[224] *See generally* text accompanying notes 173-93 *supra*.

primarily responsible for the administrative gauntlet described above.[225] These procedures represent more than an attempt by OHA to be thorough and fair. They represent a certain bureaucratic resolve to retain primary adjudicatory decisionmaking authority within the agency that traditionally has handled oil enforcement proceedings.[226] OHA has thus broadly construed section 503's regulation of procedure to require elaborate safeguards in the form of OHA "issuance procedures" despite the existence of similar protections in FERC proceedings. Though not statutorily compelled,[227] this interpretation is not at all surprising and, perhaps, is even predictable.

When Congress allocated major gas and oil ratemaking and price control functions within DOE, it did not create new administrative agencies with new identities and powers to carry out these tasks.[228] With regard to these functions, the Department created by the DOE Act consists of new alliances between two pre-existing agencies, now under new names—the Federal Energy Administration, predecessor of ERA, and the Federal Power Commission, predecessor of FERC.[229] A reorganization leaving pre-existing administrative identities and powers intact risks retaining past policies and past modes of operation. In the case of OHA, enforcement procedures have improved considerably, but in apparent oblivion to the role Congress designed for FERC, which arguably was to have been the sole or at least primary adjudicator of contested remedial orders. Thus, either OHA or FERC procedures involve a wholly unnecessary layer of adjudicative procedures within the agency; the question is, which?

D. *Solving the Problems—The Alternatives*

Potentially, many solutions are available to cure the procedural duplication that presently plagues DOE's enforcement process. First, OHA could abolish its remedial order procedures.[230] Agency adjudication would then occur primarily at FERC. This approach most closely tracks Congress' apparent intent.[231] The second option approaches the problem from the opposite direction: Congress could abolish FERC review, leaving agency adjudication entirely at OHA. One variant of this approach would be the establishment of OHA as an independent, in-house court, not unlike the Board of Hearings and Appeals proposed in the Administration's Department of Energy Bill. A second variant would ensure independence in the factfinding process by having administrative law judges render initial opinions, appealable to OHA. Since the choice among these options[232] turns largely on the extent to which agency adjudication should be separate from other agency functions, we will first examine the need for and extent of such judicial independence.

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[225] *See generally* text accompanying notes 173-86 *supra*.

[226] *See generally OHA's Goldstein: A Bureaucratic Mastermind*, Legal Times of Washington, July 9, 1979, at 5; *Obscure, Bristly Energy Official: A Power Center*, Legal Times of Washington, July 31, 1978, at 1.

[227] *See* text accompanying notes 169-170 *supra*.

[228] FEA has handled such matters since passage of the Federal Energy Administration Act in 1974. With the passage of the DOE Act, most of FEA's duties were transferred to the Secretary and then delegated to ERA. *See* notes 104-105 and accompanying text *supra*.

[229] *See* text accompanying notes 94-98 *supra*.

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[230] *See* text accompanying notes 171-85 *supra*. There it was suggested that executive procedures be limited to essentially settlement conferences. If the case could not be settled and litigation could not be avoided, the case would be handled at FERC.

[231] *See* text accompanying notes 187-93 *supra;* Carolson, note 192 *supra,* at 3-4. *See generally* 42 U.S.C. § 7193 (Supp. I 1977). It can be argued that providing for secretarial "issuance procedures" along with Commission review of these procedures gives the agency the discretion to come up with their own procedures for handling remedial order and adjustment cases. Nevertheless, it strains credulity to think that Congress anticipated *two* sets of adjudicatory procedures. Congress was more likely to have anticipated development of the informal settlement procedures in the executive wing of the agency and adjudicatory proceedings at FERC.

[232] There are, of course, others as well. For example, a third approach is simply to bypass agency adjudication altogether and bring all enforcement actions directly in the district courts. This approach is similar to the appeals procedure for a tax deficiency notice issued by the Internal Revenue Service (IRS). Upon receipt of such an IRS notice, a taxpayer may file a notice of appeal with the United States Tax Court, a United States District Court, or with the Court of Claims. 26 U.S.C. § 7422 (1976).

It is important to note that some remedial order proceedings also are taken directly to district court under the Economic Stabilization Act of 1970, Pub. L. No. 91-379, § 209, 84 Stat. 799, *reprinted at* 12 U.S.C. § 1904 note (1976). Despite vigorous argument that the Act in § 211 does not allow filing such suits without exhausting the administrative remedies of FERC review under the DOE Act (42 U.S.C. § 7193 (Supp. I 1977)), a district court recently has upheld this approach. *See* United States v. Exxon Corp., 470 F. Supp. 674 (D.D.C. 1979), *aff'd*, No. DC-75 (Temp. Emer. Ct. App. Feb. 26, 1980). *See also* 10 C.F.R. §§ 205.190(a), .204 (1979) (regulations purporting to authorize this approach).

Moreover, "DOE has recognized that it does not have authority to impose [civil penalties] itself and must instead refer such cases to the Justice Department for prosecution in the Federal Courts" even though "DOE does compromise, settle and collect civil penalties whenever deemed advisable," *See* Trowbridge, *supra* note 136, at 208 n.51. As the *Exxon* case illustrates DOE is now trying, in some cases, to "bypass those procedures and initiate . . . civil action[s] in District Court." *Id.* Utilizing various district courts around the country to enforce EPAA regulations on recovery of overcharges would seriously undermine the important goal of policy coherence. Given gradual decontrol of oil prices, however, this goal is of diminishing importance. Nevertheless, since this Article is primarily concerned with what is required for fair and efficient administrative adjudication in general, as well

1. *Separating Judicial Functions from Prosecutorial and Legislative Functions—An Overview*

Proposals for increasing judicial independence in the administrative process have been common throughout our regulatory history. They were forcefully advocated during the early twentieth century and especially during the New Deal.[233] Federal administrative courts, separate and distinct from administrative agencies, often were proposed as methods of ensuring that the judicial function remains separate from other agency activities.[234] Though such courts never were created, the agencies themselves gradually assimilated the judicial decisionmaking model.[235] In part, assimi-

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as with oil pricing litigation in particular, it does not examine district court proceedings as an alternative approach to agency regulation in detail. It assumes that the bulk of the overcharge cases are and should be handled in the first instance by OHA.

Finally, there are other variants of the approaches analyzed in the text. For example, OHA could issue a remedial order subject to appeal to FERC with FERC's role clearly designated by statute as appellate in nature. The same risk of policy fragmentation would, however, remain.

[233] *See* Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 264-74 (1978).

Independent commissions were roundly criticized by many commentators during the New Deal because of their combination of executive, prosecutorial and judicial functions which compromised judicial independence. In 1937, the Brownlow Committee proposed that independent commissions be placed within the various executive departments and their administrative and judicial functions be separated into distinct divisions. PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 40-41 (1937), *partially reprinted in* SUBCOMM. ON SEPARATION OF POWERS OF THE SEN. COMM. ON THE JUDICIARY, SEPARATION OF POWERS AND THE INDEPENDENT AGENCIES: CASES AND SELECTED READINGS S. Doc. No. 49, 91st Cong., 1st Sess. 343, 347 (1970). Professor Cushman summed up these criticisms of independent commissions: "[The independent commission] lack[s] the atmosphere of detachment and impartiality in which private rights ought to be adjudicated." R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 701 (1941).

[234] *See* Verkuil, *supra* note 233, at 262, 268-69, 271. For a recent proposal to establish an administrative court, see de Seife, *Administrative Law Reform: A Focus on the Administrative Law Judge*, 13 VAL. L. REV. 229, 242-43 (1979). For recent proposals to broaden the scope of federal judicial review of agency action, see note 181 *supra*.

[235] There are various explanations why administrative agencies easily assimilated adversary procedures. Dean Pound observed that the emerging legal characteristics of the early twentieth century—the sequence of rules, principles, conceptions, and standards—was a phase in the development of modern conceptions of justice and truth. Pound, *The Administrative Application of Legal Standards*, 42 A.B.A. REP. 445, 458-64 (1919). The application of these standards to administrative bodies was necessary to maintain the objectivity and confidence inspired by legal standards. *Id.* at 463-65. Professor Bernstein, on the other hand, explains this development differently:

> Original preoccupation with the inadequacies of the legislative and judicial processes gave way gradually to skepticism about the judicial capacity of the commissions and even to charges that they were by nature inherently absolutist and arbitrary. Commissions, it was claimed, could achieve fairness only by following the pattern of the courts in handling cases. Kept on the defensive by the

lation was the natural response to the skeptical view taken of government's relatively new regulatory role.[236] The check on regulatory power provided by an adversarial system perhaps allayed some of this skepticism. Moreover, as Jerome Frank observed, "the 'fight' [or adversary] theory of justice is a sort of legal laissez-faire."[237] A gloves off adversarial approach theoretically ensured the "best" decision possible. It also provided the regulated industries with every opportunity to contest, and perhaps thwart or delay, substantive agency action.

There are, of course, other reasons to adopt an adversarial decision-making model. It embodies certain notions of fairness that are appropriate regardless of one's view of the wisdom or efficacy of the substantive regulation involved. For example, the APA's adversarial model fulfills the litigants' general expectation that the same person or tribunal cannot be both prosecutor and judge.[238] The reason is clear, particularly in enforcement proceedings: a

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> attacks of the bar and the courts, commissions have judicialized their procedures.

M. Bernstein, Regulating Business by Independent Commission 72 (1955).

In explaining this development, other commentators recognized that administrative decisions were actually judicial determinations made by an agency rather than by a court and that these judicial-like decisions were best left to agencies because of their inherent expertise and procedural flexibility. *See, e.g.*, J. Landis, The Administrative Process 93-100 (1938); B. Schwartz, The Professor and the Commissions 45-46 (1959). A more recent suggestion is that the push for political independence, especially in the independent regulatory commissions, resulted in the judicialization of regulatory procedures. Reformers believed that they could obtain freedom from political influence and corruption by adopting the judicial model as opposed to the political model. *See* Cutler & Johnson, ***Regulation and the Political Process***, 84 Yale L.J. 1395, 1402-03 (1975).

[236] *See, e.g.*, M. Bernstein, *supra* note 235, at 72; *see also* Pound, *supra* note 235, at 446, 458-59. Dean Pound saw the growth of administrative law as an adjunct to the overall "shifting of the center of gravity in our polity" to the executive branch. *Id.* at 446. He was concerned with this shift because the executive gave more authority and responsibility to administrative agencies. In nineteenth century American thinking, law and administration were put as rivals rather than complementary agencies. *Id.* at 450. The appropriate role for administration had yet to be worked out in the scheme of governmental powers. R. Pound, Administrative Law 1-5 (1942). Dean Pound recommended that adjudication be given to the courts and not left with administrative agencies. Pound, *supra* note 235, at 464.

Felix Frankfurter also noted that the general fear of administrative arbitrariness surrounding the growth of administrative agencies would only be eliminated by the institutionalization of judicial standards and by the increasing of awareness and zealousness of the populace. Frankfurter, *The Task of Administrative Law*, 75 U. Pa. L. Rev. 614, 618 (1927).

[237] J. Frank, Courts On Trial 92 (1st Princeton paperback ed. 1973).

[238] *See* 2 K. Davis, *supra* note 207, §§ 12.01-.06; K. Davis, Administrative Law of the Seventies §§ 12.01-.06 (1976 & Supp. 1980); *see generally* Hamilton, *supra* note 14, at 1179; Pedersen, *The Decline of Separation of Functions in Regulatory Agencies*, 64 Va. L. Rev. 991, 1002-03 (1978).

basic tenet of procedural fairness in such proceedings is impartiality on the part of the decisionmaker.[239] A presiding officer who is intimately involved in the prosecution or investigation of an individual is likely to have a predetermined opinion of the ultimate outcome of the case and, in any event, usually will be perceived by litigants as being biased against them.[240] The Supreme Court has held that complete separation of judicial, prosecutorial, and investigatory functions is not necessarily constitutionally required,[241] but the adjudicatory provisions of the APA clearly provide for such separation.[242] Nevertheless, even for purposes of APA adjudication, adequate separation of these functions does not require that such tasks be confined to separate and distinct agencies.[243] Internal separation of these functions has long been considered a satisfactory way of resolving the inevitable problems confronting an agency charged with legislative, executive, and judicial tasks.[244] Moreover, while prosecutorial and adjudicatory functions are separate in most agencies,[245] independent commissions as well as executive officials regularly mix their judicial and policymaking functions.[246]

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[239] *See* Cramton, *supra* note 18, at 588.

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> A first and fundamental principle of natural justice is that no man shall be judge in his own cause; a tribunal that has enforcing functions has by that fact an interest in the outcome of the litigation to which it is a party and hence should not take part in the process of decision.

J. Landis, *supra* note 235, at 92. *See* Pedersen, *supra* note 238, at 1002. *Cf.* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 Cornell L. Rev. 772, 778-90 (1974) (suggesting that full adversary proceedings inappropriate in nonaccusatory social welfare cases).

[241] Withrow v. Larkin, 421 U.S. 35, 47 (1975). The Supreme Court rejected the argument that a combination of functions was constitutionally impermissible.

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id.

In Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493-94, 497 (1976), the court held that a school board's unsuccessful negotiations of a collective bargaining agreement with a teacher's union did not taint the board's subsequent decision to dismiss striking teachers. Neither the board's familiarity with the facts of the case, nor its prior public position on a policy issue related to the dispute were sufficient to overcome the presumption of honesty and integrity in policymakers with decision-making power.

It has been suggested that the separation of prosecutorial or investigative functions from adjudicatory functions may be more constitutionally desirable with regard to "prosecuting agencies" such as the FTC or the NLRB than with "non-accusatory" hearings before bodies such as the Social Security Board or the Veterans Administration. 2 K. Davis, *supra* note 207 § 13.01, at 173; Pedersen, *supra* note 238, at 993-96. Courts have not generally recognized such a distinction. *See, e.g.*, Marcello v. Bonds, 349 U.S. 302, 311 (1955) (due process not violated in deportation case when adjudicating officers were supervised by investigators and prosecutors); Marathon Oil Co. v. Environmental Protection Agency, 564 F.2d 1253, 1265 (9th Cir. 1977) (due process not violated when regional administrator, who made initial decision on permit issuance, reviewed his decision after additional hearings); NLRB v. Aaron Bros. Corp., 563 F.2d 409, 413 (9th Cir. 1977) (regional director's exercise of both investigative and adjudicative responsibilities in connection with issuance and resolution of unfair labor practice complaint did not violate due process). *See also* 2 K. Davis, *supra* note 207 § 13.02, at 175.

There is, however, precedent for the establishment of an in-house agency court devoted solely to "on the record" adjudicatory disputes. The Occupational Health and Safety Commission is an independent agency within the Department of Labor. It consists of three independent commissioners whose sole function is to decide adjudicatory disputes.[247] The Board of Hearings and Appeals proposed in the initial DOE bill appears to have been modeled on this commission.[248] Abolishing FERC review and making OHA an independent commission with jurisdiction over adjudicatory disputes such as contested remedial orders similarly would approximate the Occupational Health and Safety Commission approach as well as the proposal in the Administration's initial DOE bill.[249] But neither independent FERC review of remedial orders nor an independent in-house agency judiciary is necessary for fair and efficient agency adjudication.

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[242] 5 U.S.C. §§ 554, 556, 557 (1976) (governing on the record adjudicatory proceedings). Section 554(d) provides that:

> The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—
>
> (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
>
> (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency . . . .

[243] *See, e.g.*, Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1218 (1939); Nathanson, *Separation of Functions Within Federal Administrative Agencies*, 35 ILL. L. REV. 901, 934-35 (1941).

[244] Jaffe, *supra* note 243, at 1216-18; Nathanson, *supra* note 243, at 934-35. *But see* Pedersen, *supra* note 238, at 994 (on the breakdown of this concept in nonaccusatory proceedings).

[245] For recent proposals calling for complete separation, see note 234 *supra*. *Compare* THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971) [hereinafter cited as THE ASH COUNCIL REPORT] *with* R. NOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS (1971).

[246] For example, the Federal Trade Commission has rulemaking powers under 15 U.S.C. § 57a (1976), and also hears appeals from decisions of administrative law judges in cases applying those rules. *See* Appeal from initial decision, 16 C.F.R. § 3.52 (1979). *See also* Petitions for discretionary review of initial decisions or recommended decisions—review proceedings, 14 C.F.R. § 302.28 (1979) (CAB). Similarly, executive departments have administrators involved in both adjudication and policymaking. For example, the Clean Air Act empowers an administrative law judge in the Environmental Protection Agency to conduct an adjudicatory hearing in a determination of noncompliance. The judge's decision is in turn appealable to an agency administrator. 42 U.S.C. § 7420 (Supp. I 1977). *See* Orloff, *Buttressing the Traditional Approach to Enforcement of Environmental Requirements: Noncompliance Penalties Under the Clean Air Act*, 9 ENVT'L L. REP. 50029, 50037 (1979).

2. *An In-House Agency Court—The Pure Form*

An independent commission whose sole function is to resolve adjudicatory disputes within an agency offers several advantages, particularly in enforcement cases. Since agency judges would be independent factfinders, they would be neither responsible for the specific rule applied in the particular case, nor accountable to agency policymakers in cases of disagreement over a rule's meaning or application. Further, as independent commissioners, they would be above the political fray and presumably immune to political pressure.[250] Decisions by an in-house agency court could thus enhance litigants' perceptions of fairness and, in some cases, perhaps the actual fairness of the adjudicatory process.[251] Furthermore, if recent reforms aimed at streamlining the administrative processes are to survive judicial attack, courts must have confidence in the agency's procedural expertise.[252] Perhaps courts would grant more deference to innovative procedural decisions made by an agency judiciary.

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[247] 29 U.S.C. § 661 (1976). *See generally* Sullivan, *supra* note 218, at 181-83.

[248] *See* text accompanying notes 53-64 *supra*.

[249] There is, however, one major difference. OHA also engages in policymaking through its exceptions program. The DOE Act, 42 U.S.C. § 7194 (Supp. I 1977), authorizes the Secretary to grant adjustments to any rule, regulation or order issued under the laws presently governing the price and allocation of oil and various petroleum products. The purpose of such adjustments is "to prevent special hardship, inequity, or unfair distribution of burdens" in the application of such rules to any person. *Id.* The Secretary has delegated the power to grant or deny adjustment requests to OHA. In effect, OHA now plays the role of an equitable court exercising significant policymaking functions. *See generally* A. Aman, *supra* note 120, at 20-48. This is a continuation of the policymaking role played by the Office of Exceptions and Appeals in the old FEA. *See generally* PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 111.

The scope of exceptions relief can vary from regulatory fine tuning to serious encroachment on DOE's rules. The complexity of the petroleum industry and the DOE regulatory program makes it impossible to anticipate all, or even a significant portion of, the factual circumstances that might arise in energy regulation. The flexibility provided by the exceptions process allows these varied circumstances to be met. However, the exceptions can swallow up the rules, in effect, becoming an alternative form of rulemaking. *See* A. Aman, *supra* note 120, at 76-84. Decisions significantly changing a rule should be referred to the Secretary for a rulemaking proceeding). Both OHA and its predecessor, the Office of Exceptions and Appeals, have used the exceptions process to formulate significant new pricing policies. *See* PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 110-11.

There are, however, serious disadvantages to in-house agency courts. The foremost is policy fragmentation. Policy considerations underlie any application of law to fact even though they do not generally dominate enforcement proceedings. The separation of judicial and policymaking functions increases the possibility of conflicting decisions between those who make the rules and those who apply them.[253] The likelihood of such conflict becomes greater still if appointments to the agency court extend from one administration into the next, when new executive officers may differ with the policy perspectives of the incumbent judges.[254]

Furthermore, if an agency court is granted jurisdiction over all agency adjudication, including licensing or ratemaking, policy determinations may become overjudicialized.[255] In many areas, only integration of judicial and legislative functions offers the court the broad perspective and data base necessary for an enlightened decision. As one commentator recently pointed out, decisions "in complicated technical fields, such as those concerning licenses for nuclear power plants, permits to discharge substances into water, and removal of pesticides from the market" require the decision-maker to face "a large number of policy-related choices that fall within the statutory mandate."[256] To the extent that an in-house agency court encourages adherence to the judicial decision-making model even when policy questions are involved, it might undercut sound decisionmaking on energy-related matters.[257]

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[250] This notion of independence from politics often is a primary reason for advocating that policymaking and judicial functions should be combined in decisionmakers who are immune from pressure by elected officials or cabinet-level presidential appointees. *See, e.g.*, K. Davis, *supra* note 238, § 1.09-1. Independence from politically accountable officials, however, has been sharply attacked and criticized. *See, e.g.*, M. Bernstein, *supra* note 235, at 294-95; W. Cary, Politics and Regulatory Agencies 19 (1967); Cutler & Johnson, *supra* note 235, at 1399-1400, 1402-09. *But see*, Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 Va. L. Rev. 947, 950-56 (1971) (asserting that independent commissions are no less politically accountable than executive agencies). *See generally* ABA Report, *supra* note 77, at 99-154.

[251] *See* Currie, *supra* note 218, at 1160. *See also* R. Cushman, *supra* note 233, at 701-02 (emphasizing that those before an administrative tribunal need to feel that they are receiving impartial justice).

[252] *See generally* Verkuil, *supra* note 233, at 309-10.

[253] *See* Currie, supra note 218, at 1116-20 (discussing problems of policy fragmentation and conflict between Secretary of Labor, rulemaking authority, and OSHRC, independent adjudicator). For a discussion of the institutional conflict between OSHA and OSHRC, see Sullivan, *supra* note 218, at 183-94.

[254] This, of course, is entirely possible given the staggered terms of office agency judges would be likely to have.

[255] *See* Pedersen, *supra* note 238, at 1002-07.

3. *Making OHA an Independent Agency Court*

Even if one were to decide that the advantages of an in-house court outweigh the disadvantages, conferring independent status on OHA would not produce an agency court in the pure form described above. OHA is directly involved in agency policymaking because of its role in granting or denying requests for adjustments to secretarial rules and orders.[258] Indeed, OHA has utilized the adjustments process as a cutting edge of policy formulation within the department.[259] Given FERC's power to review and possibly to veto certain secretarial "energy actions" and rules pertaining to oil regulations, an independent OHA would further fragment policymaking by splitting authority over oil matters among two independent commissions and the executive.

In addition to exacerbating the likelihood of policy fragmentation, creating a second independent commission within DOE would further remove policymaking powers from political controls. The wisdom of entrusting significant policy decisions to undemocratic institutions such as independent commissions has long been debated.[260] Recent reform proposals urge that policymaking functions should rest in the hands of officials more directly accountable to the electorate.[261] Making OHA independent would help to insulate another policymaking unit within the government from more direct political control. Yet even if one were to reject the policy arguments underlying the criticisms of independent regulatory commissions, there are, nevertheless, less drastic means of providing for independence in the OHA decisionmaking process, short of the creation of another commission. The use of administrative law judges would, for example, ensure com-

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[256] *Id.* at 995-96 (footnotes omitted).

[257] *See id.* at 1008-10.

[258] *See* note 23 *supra*.

[259] *Id.* This is a continuation of the old FEA approach. *See generally* PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 111-23.

[260] Though they are labeled "independent commissions," some have argued that these commissions are anything but independent. The theory that independence assures "judge-like wisdom, balance, and insight" in administration is a dangerous illusion. Fesler, *Independent Regulatory Establishments*, in ELEMENTS OF PUBLIC ADMINISTRATION 227 (F. Marx ed. 1946). Notions of independence allow us to pretend "that we can preserve democracy and still vest economic powers in a governmental agency that is not clearly subject to officials who in turn are responsible to the people." *Id.* at 228. But "[t]he process of regulation is unavoidably political." M. BERNSTEIN, *supra* note 235, at 258. Thus, the "most serious implication of the theory of the independent commission is a dangerously naive concept of

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democracy as a scheme of government to which political responsibility has no necessary relevance." *Id.* at 146; *cf.* Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1188-91 (1973) (independent commissions susceptible to political process and their failure to satisfy public interest cannot result from political immunity). Critics through the years have argued for a reappraisal of the role of independent commissions on this ground. *See, e.g.*, M. BERNSTEIN, *supra* note 235, at 281-84; R. CUSHMAN, *supra* note 233, at 616-21 (experience of British Unemployment Assistance Board demonstrates futility of placing impartial, nonpolitical board in charge of program whose past administration has been controversial).

One of the focal points of present criticism is the independent commission's failure to integrate its substantive policy with that made by other independent commissions:

> While Congress establishes the goals, it cannot legislate the details of every action taken in pursuit of each goal, or make the balancing choices that each such decision requires. It has therefore delegated this task to the regulatory agencies. But we have given each of the regulatory agencies one set of primary goals, with only limited responsibility for balancing a proposed action in pursuit of its own goals against adverse impacts on the pursuit of other goals. For most of these agencies, no effective mechanisms exist for coordinating the decisions of one agency with those of other agencies, or conforming them to the balancing judgments of elected generalists, such as the President and Congress.

ABA REPORT, *supra* note 77, at 99-100. Lack of policy integration impedes not only the political goals of the executive and legislature but also regulation in the broad public interest. M. BERNSTEIN, *supra* note 235, at 164-66. Thus, any reform of independent regulatory commissions must attempt to restore political accountability as the basis for policy integration. *See* THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK 13-15 (1971). *But see* Robinson, *supra* note 24, at 950-55 (political accountability and policy integration would not necessarily be achieved by replacing independent commissions with executive agencies under presidential control); Thomas, *Politics, Structure and Personnel in Administrative Regulation*, 57 VA. L. REV. 1033, 1062-65 (1971) (factors impeding policy control extend beyond structural characteristics to include inherent political nature of regulation). For another source discussing independent commissions, see J. FREEDMAN, *supra* note 209, at 58-77.

[261] *See* ABA REPORT, *supra* note 77, at 99-154. *See also* Cutler & Johnson, *supra* note 235, at 1397, 1399. The authors argue that in the absence of any political control, agency decisions on substantive policy often fail to coincide with the policy decisions that politically accountable bodies would have preferred. We allow the independent agency to make its decision independently; but when we dislike this decision, we then resort to the political process to change it. This failure of regulation can be avoided in the first instance with political checks and oversights, which have been proposed in various reorganization schemes. Cutler and Johnson argue that the President should be given the authority to modify or direct agency actions and priorities. *Id.* at 1414-17. Bernstein condemns the

plete independence at the crucial factfinding stage of the proceeding.[262]

Finally, there are practical reasons for rejecting a proposal to make OHA an independent commission. The oil program is being phased out. Enforcement actions are likely to be completed within a few years. OHA undoubtedly will have other regulatory tasks to perform for which independence may be neither necessary nor desirable.[263]

4. *Abolishing FERC Review*

Rather than creating a second independent commission within DOE, FERC review of contested remedial orders should be abolished.[264] OHA would then have sole responsibility for adjudicating these cases. In addition to minimizing the policy frag-

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entire regulatory commission concept, arguing that "new forms, techniques, and ideas" must be adopted. M. Bernstein, *supra* note 235, at 296-97.

[262] *See* text following note 338 *infra.*

[263] *See* note 9 *supra.* Of course, to the extent new enforcement proceedings are begun, these cases may go on well into the 1980's.

[264] Abolishing FERC review will be controversial and, in general, likely to be opposed by the regulated companies involved. A primary argument on their behalf is that DOE's structure should continue to protect the judicial function, "both in fact and in appearance, from undue political influence." Letter from Donald B. Craven, Attorney for Exxon Corp., to Betty Jo Christian, Chairman, Administrative Conference Committee on Ratemaking and Economic Regulation (Jan. 18, 1980) (on file at *Cornell Law Review*). Unlike politically accountable cabinet officers, independent commissioners are presumed to be relatively immune to the ever-changing political winds.

> We may conclude, then, that Congress has had two general aims in creating independent regulatory bodies: first, to secure reasonably impartial and nonpartisan handling of quasi-judicial tasks; second, the honest and efficient handling of tasks too big to be entrusted to the politicians in the executive departments.

R. Cushman, *supra* note 233, at 669. *See also* The Ash Council Report, *supra* note 18, at 16-18.

There are, however, other possible reasons. The regulated industries often accept the combination of functions inherent in an independent commission because they do not always perceive the regulators as their foes. In many agencies, the regulators are sympathetic to industry's point of view. M. Bernstein, *supra* note 235, at 87-90; W. Cary, *supra* note 250, at 67-68; B. Schwartz, *supra* note 235, at 118-19; Cutler & Johnson, *supra* note 235, at 1404; McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 Va. L. Rev. 373, 424-25 (1961). *But cf.* Jaffe, Book Review, 65 Yale L.J. 1068, 1071-72 (1956) (reviewing M. Bernstein, *supra* note 235) (arguing that industry orientation occurs in executive departments as well as independent agencies). Independence is also related to the ideas of expertness, judicialization, and freedom from political influence. M. Bernstein, *supra* note 235, at 148. The independent regulatory commissions are perceived to combine these characteristics into one group. Courts may also be independent, but they lack the necessary expertise and executive departments lack freedom from political pressures.

mentation that is likely to result under the present approach, there are other reasons why Congress should adopt this approach.

First, FERC's present judicial role differs significantly from an independent agency court in its pure form, primarily in that FERC's duties extend far beyond agency adjudication dealing with oil pricing matters. As successor to the Federal Power Commission, FERC inherited a substantial backlog of cases, and acquired a number of new responsibilities as well.[265] It has enormous day-to-day policymaking and enforcement responsibilities for a variety of programs including the enormously complex Natural Gas Policy Act of 1978.[266] Moreover, prior to passage of the DOE Act, FERC's predecessor, the Federal Power Commission, had no expertise in oil regulation.[267] Adding one more new task, such as review of OHA remedial orders, to an already overburdened agency is impractical and, in any event, is likely to result in FERC playing primarily an appellate role.[268] To the extent this occurs, the FERC layer of review does not provide much additional actual protection for the litigants, but rather serves primarily as a source of delay before issuance of a final agency order. Indeed, the appellate role in this process is, and should be, played by the judiciary.

Second and more important, even if FERC were to exercise its apparent authority to review OHA orders on a de novo basis, such scrutiny no longer appears to be necessary. The primary reasons for Congress' institution of FERC review no longer exist. DOE's adjudicatory and enforcement responsibilities now are adequately separated: OHA handles adjudicatory functions, ERA deals with enforcement, and each unit independently reports to the Secretary of Energy.[269] Moreover, OHA's enforcement procedures provide much more protection to litigants than those in existence at the time Congress authorized FERC review. Though some may question why OHA developed such elaborate procedures in the first place,[270] their beneficial, protective effects can and should be preserved by statute.

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[265] For FERC's new responsibility, and for authority on its backlog of cases, see Lawrence & Muchow, *supra* note 193; text accompanying notes 110-116 *supra*.

[266] 15 U.S.C.A. §§ 3311-3432 (West Supp. 1979).

[267] *See generally* text accompanying notes 94-97 *supra*.

[268] *See* text accompanying notes 110-116 *supra*.

[269] As the new regulations issued on behalf of OHA demonstrate, internal separation of adjudicatory and enforcement responsibilities can be achieved within an executive agency. *See* text accompanying notes 173-91 *supra*. It is possible to establish substantial independence within an executive agency without necessarily becoming a fully independent regulatory commission.

In short, though acceptability, efficiency, and accuracy considerations permit various ways to overcome the present problems, abolition of FERC review of OHA remedial orders provides the best solution. It would ease FERC's burden and eliminate the present duplication of administrative functions. Most important, it would lessen the risk of policy fragmentation between FERC and DOE.[271] A unified, coherent approach to energy policy was one of the main goals of the reorganization attempt that led to the creation of DOE. Retaining adjudicatory responsibility for an executive program within the executive wing of the agency would further this goal. Congress should abolish FERC review and, at the very least, make the procedural provisions for FERC review under the DOE Act applicable to OHA. As is discussed below, Congress should also consider applying the adjudicatory provisions of an amended APA to all agency enforcement proceedings, including those at DOE.[272]

E. *A Residual Problem—Duplication of Judicial Review*

Even if the problems of internal policy fragmentation and procedural duplication are solved, an overarching problem remains: duplication of judicial review of decisions emanating from DOE. There are presently two levels of appellate review as of right.[273] Final orders issued by FERC are appealable to the district court, and then to the Temporary Emergency Court of Appeals. Only one level of appellate review is needed.

Duplication should be eliminated by abolishing district court review of agency remedial order decisions.[274] The present two-tier judicial review provisions established by the Emergency Petroleum Allocation Act resulted from an emergency approach to legislation,[275] rather than from a carefully thought-out legislative program. In its haste to meet the demands of the moment, Congress simply incorporated by reference the judicial framework established under the Economic Stabilization Act of 1970.[276] Two-tier appellate review may have been appropriate for a program applying temporary price controls to virtually all American businesses, large and small. District court review provided a local judicial forum for smaller businesses that needed an inexpensive method of resolving disputes. But this rationale loses much of its force when applied to a relatively long-term oil pricing program.

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[270] *See* notes 171-185 and accompanying text *supra*.

[271] In this regard, Congress should also consider abolition of FERC review of various secretarial rules. Though a complete review of these provisions is beyond the scope of this Article, keeping the policymaking functions within one agency is a worthwhile goal. Giving the Secretary the basic responsibility for the EPAA and its progeny and then allowing FERC the opportunity to redirect the executive's policy directions offers not only a check on executive power, but an additional opportunity for conflict and dissension. Even if such dissension does not surface, it may just as well be due to conflict avoidance as general agreement.

[272] For the pros and cons of these proposals, see notes 298-301 and accompanying text *infra*.

[273] In addition, Supreme Court review is available by way of writ of certiorari.

[274] Two levels of appellate judicial review also exist for adjustments decisions. This too, would appear to be unnecessarily duplicative.

The advantages of the two-tier approach to judicial review[277] evaporate when the losing party, whether it be the government or a company, decides to appeal. A substantial portion of remedial order decisions from district courts are likely to be appealed, given the enormous amounts of money that often are at stake. In this category of cases, district court review merely duplicates the circuit court's function and delays the issuance of an authoritative and final decision.[278] To the extent that some cases are not ap-

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[275] The House report describes the bill as giving the President "temporary authority" to deal with "existing or imminent shortages and dislocations" in oil distribution, and "to adopt within 10 days of enactment and to implement 15 days thereafter a program providing for the mandatory allocation" of oil and petroleum products. H.R. REP. NO. 531, 93d Cong., 1st Sess. 1, 5, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2582, 2582.

[276] The legislative history of the Emergency Petroleum Allocation Act does not discuss judicial review for the oil regulation program. The Act referred to the judicial review provisions of the Economic Stabilization Act and simply incorporated them by reference. *See* H.R. REP. NO. 531, 93d Cong., 1st Sess. 22, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2582, 2599; H.R. REP. NO. 628, 93d Cong., 1st Sess. 31, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2688, 2707-08.

[277] An additional advantage "of mandatory two tier review [appeal as of right] over single-tier district court review is that it provides a mechanism for the resolution of inconsistencies within and between districts and for the achievement of circuit-wide uniformity." Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 16 (1975).

[278] As Professors Currie and Goodman have noted with regard to two-tier review:

> In every case eventually appealed to the circuit courts, interposition of the district court substantially increases the cost of litigation and delays the resolution of the controversy . . . . The litigant must pay double filing fees and brief reproduction costs, and must transport his attorney to two courts instead of to one. He must also pay for extra work by his lawyers . . . . The indirect costs of the added delay . . . are more elusive. Delay may induce parties to settle on terms less just than would be imposed by a court decision; it may cause deterioration of evidence that must be used if there is a retrial; similar cases may have to be litigated until the disputed point of law is settled; it also increases the

pealed, however, the risk of various conflicting district court decisions increases. Moreover, if a case is not appealed from district court to the Temporary Emergency Court of Appeals, one cannot necessarily assume that the process was acceptable to the parties involved. The cost of two appeals rather than one may have effectively excluded some litigants from the superior forum.[279]

Many of the regulated companies have argued, however, that the primary value of district court review in the oil program is that it allows the parties involved broader discovery rights than those provided by OHA.[280] In many cases, it is contended, discovery has made the difference between victory and defeat.[281] These litigants, however, have focused on a problem wholly unrelated to the primary purpose of appellate district court review of administrative decisions. Moreover, the discovery granted by district courts has been in the context of pre-enforcement actions seeking declaratory and injunctive relief, not in the context of appeals to the district court after a final agency adjudication.[282]

> harm done by a challenged practice or by its temporary restraint during the period of litigation.

Id. at 16-17.

[279] Even if there is no appeal, one cannot assume that the process was necessarily acceptable to the parties. As Professors Currie and Goodman have noted:

> Nor are the disadvantages of two-tier review limited to those cases in which appeals are taken. Perhaps the most unfortunate consequence of adding the district court stage is that it prices the appeals court beyond the reach of many litigants. The party who loses in the district court may stop at that point, not because he is satisfied or even resigned, but because he is exhausted. When that occurs, the objection is not only that the exhausted litigant has been denied access to a superior forum, as under a single-tier district court system, but that he has effectively been excluded from a superior forum that is available to more affluent litigants. Further, if the cost of another appeal is sufficiently great in comparison to the stakes in an entire class of cases, interposing the district court could create substantial disuniformity.

Id. at 17.

[280] *See* note 314 *infra*.

[281] *See, e.g.*, Standard Oil Co. v. DOE, 596 F.2d 1029, 1052-56 (Temp. Emer. Ct. App. 1978). *See also* Sun Co., Inc., Tentative Recommendations Regarding Remedial Order Procedures of the Department of Energy 37-41 (Nov. 28, 1979) (pursuant to the testimony of Robert O. Lewers before the Administrative Conference of the United States) (on file at *Cornell Law Review*).

[282] *See, e.g.*, Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913 (E.D. Penn 1979); Standard Oil Co. v. FEA, 440 F. Supp. 328 (N.D. Ohio, 1977); Phillips Petrol. Co. v. FEA, 435 F. Supp. 1239 (D. Del. 1977).

An argument can be made, however, that abolition of appellate district court review could jeopardize the ability of companies to seek pre-enforcement district court review and thus deprive them of an opportunity to engage in discovery under the federal rules. *See, e.g.*, Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979) ("In the absence of a statute

Adequate discovery, however, can and should be made available at the agency level.[283] It simply is unnecessary to add an extra

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prescribing review in a particular court, 'nonstatutory' review may be sought in a district court under any applicable jurisdictional grant. If, however, there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies"). The validity of or need for pre-enforcement review is beyond the scope of this Article. The recommendations with regard to judicial review deal solely with appellate district court review after final agency adjudication has occurred.

[283] OHA's regulations provide for discovery (10 C.F.R. § 205.198(a) (1979)), but only under an order issued by OHA. These orders are granted if OHA determines that discovery is "necessary for the party to obtain relevant and material evidence and that discovery will not unduly delay the proceeding." *Id.* § 205.198(e). Oil companies have expressed great dissatisfaction with OHA's rule and its application. They argue that OHA's discovery rules fall short of the Federal Rules of Civil Procedure and that, in any event, OHA has applied its standards far too stringently in the past.

Discovery under OHA's regulations differs from discovery under the Federal Rules of Civil Procedure in at least five ways. First, under the Federal Rules of Civil Procedure, discovery is permissible "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence," even though the information immediately sought is not evidence itself. FED. R. CIV. P. 26(b)(1). OHA generally will permit discovery of evidence itself and will not allow discovery which may lead to evidence, because this latter type of discovery "would unduly delay the . . . proceeding." *See, e.g.*, Supreme Petroleum Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,515 (1979).

Second, under the Federal Rules of Civil Procedure the parties, by and large, regulate discovery between themselves. They do not have to apply to the court for permission to engage in discovery. Parties only appear in court if there is a breakdown in discovery and a protective order (FED. R. CIV. P. 26(c)), an order compelling discovery (FED. R. CIV. P. 37(a)), or imposition of sanctions for failure to comply with an order (FED. R. CIV. P. 37(b)) is sought. Under OHA regulations, however, if a person wishes to utilize discovery, he must file a motion to do so with OHA. 10 C.F.R. § 205.198 (1979).

A third difference relates to the timing of discovery. Under the Federal Rules of Civil Procedure discovery may generally be obtained anytime from the filing of the lawsuit until trial actually begins; the only significant exception to this being that plaintiffs may not take depositions upon oral examination "prior to the expiration of 30 days after service of the summons and complaint upon any defendant" without leave of court unless the defendant has sought discovery within the 30 day period. FED. R. CIV. P. 30(a). OHA regulations narrowly limit the time period during which a person may file a motion for discovery. As noted above, ERA begins an enforcement proceeding by filing a NOPV. 10 C.F.R. § 205.191 (1979). After 30 days, ERA may issue a proposed remedial order (PRO). *Id.* § 205.192. Once notice of the PRO is published in the Federal Register, an "aggrieved person" then has 15 days within which to file a Notice of Objection to the PRO. If a Notice of Objection is not filed within that time period, the person "shall be deemed to have admitted the findings of fact and conclusions of law as stated in the PRO . . . [and] the PRO may be issued as a final order." *Id.* § 205.193. A person then has 40 days after he has filed his Notice of Objection to file his Statement of Objections. *Id.* § 205.196. If a person intends to file a motion for discovery, he must file it at the same time he files his Statement of Objections. *Id.* § 205.198. Thus, persons generally are required to request all discovery they may want to employ within 55 days of the publication of the PRO.

layer of appellate judicial review to achieve this result. In short,

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OHA has indicated a strong reluctance to depart from this strict timetable. In Time Oil Co., [1979 Transfer Binder] EN. MNGM'T (3 DOE) ¶ 82,542 (1979). OHA denied a motion for discovery which was filed after the time limitation had expired. *Time Oil* claimed that this motion should be granted under the provisions of the regulations which allow for extensions if cause can be shown. *See generally* 10 C.F.R. § 205.199G (1979). OHA stated that, while it is "more concerned with the merits of controversies than with mere procedural niceties and technicalities .... Time has already been given considerable procedural flexibility during the course of this proceeding ...." [1979 Transfer Binder] EN. MNGM'T (3 DOE) ¶ 82,542. OHA also indicated that Time had neither indicated that discovery of this material was "critical" to proving its case nor "that the substance of this request differs substantially" from that of a prior request which had been partially granted. *Id.* Also, Time's motion of an evidentiary hearing on similar issues had been partially granted. Finally, Time had requested discovery here as an intervenor in a case brought by DOE against another oil company, and that company had opposed this discovery motion.

OHA has also denied a motion for discovery in a case where the party moving for discovery not only failed to file the motion within the proper time limitations but also failed to specify, as the regulations require (10 C.F.R. § 205.198(c) (1979)), the reasons why discovery was necessary. Mid-Continent Sys., Inc., [1979 Transfer Binder] EN. MNGM'T (3 DOE) ¶ 82, 556 (1979). In addition, the Company had previously been granted an evidentiary hearing at which it could present testimony on issues identical to those for which it sought discovery. The company had, however, failed to comply with OHA requirements to identify witnesses and serve documentary evidence in advance on the other parties. Although the tight time requirement imposed by OHA can, in some circumstances, appear to be unreasonable, OHA generally is willing to accede to legitimate requests for extensions but not to allow dilatory motions to delay the proceedings.

A fourth difference relates to the persons to whom discovery is available. Under the Federal Rules of Civil Procedure, discovery is available only to parties. FED. R. CIV. P. 26(a). Under the OHA regulations, motions for discovery may be filed by persons who filed a Notice and Statement of Objections. 10 C.F.R. § 205.198 (1979). These Notices may be filed by any person aggrieved by the issuance of the PRO. 10 C.F.R. § 205.193(a) (1979).

A fifth difference relates to the type of issue for which an admission may be requested. Federal rule 36 permits requests to admit the application of law to facts. The OHA regulations governing discovery state that "[a] motion for discovery may request that ... [a] person admit to the genuineness of any relevant document or the truth of any relevant fact." 10 C.F.R. § 205.198(b)(3) (1979). OHA has interpreted the language "truth of any relevant fact" to include only requests to admit facts, and that requests to admit issues of law or the application of law to facts are impermissible under the regulations. William Herbert Hunt Trust Estate, [1979 Transfer Binder] EN. MNGM'T (3 DOE) ¶ 82,525 (1979).

Though there arguably may have been problems with OHA's discovery processes, requiring that OHA adopt the Federal Rules of Civil Procedure for purposes of discovery would be an overreaction to these problems. The federal rules are designed to cover a very wide variety of circumstances, and broad procedures are necessary for the success of the rules in this wide variety of situations. OHA litigation is much narrower in scope and there is substantial similarity among the cases brought before OHA. OHA discovery procedures can and should be tailored to the specific needs of OHA litigation. Moreover, OHA's fear that discovery may be used as a delaying tactic is not unjustified, particularly in enforcement cases where there often may be an incentive on the part of those contesting remedial orders to delay the proceedings. For example, in the discovery sought in the case of Atlantic Richfield Co., No. BRZ-0015 (DOE Jan. 25, 1980), thousands of interrogatories were submitted by the oil companies to Office of Special Counsel. OSC estimates that it would require 60 professional person years to respond to these interrogatives. OSC Brief at 88. The given a fair administrative adjudicatory process, one level of ap-

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oil companies conceded that their requests were extensive, but noted that the amount in dispute in this case exceeds $1.2 billion. They also disputed the accuracy of OSC's estimation of the time required to respond. Reply Brief at 146-49. OHA's procedures give the agency much more flexibility in controlling this process and greatly lessen the likelihood of abuse by the litigants involved. In this regard, the federal rules discovery procedures hardly are models of efficiency. They have long been subject to abuse and a source of unnecessary delay. OHA's approach tries to avoid these pitfalls.

This is not to suggest, however, that in retaining such tight control over its discovery process, OHA has not been subject to intense criticism. This is particularly true with regard to its handling of discovery requests seeking to obtain an agency's contemporaneous construction of arguably vague and improperly applied regulations.

Perhaps the greatest problem throughout the oil pricing program has been the complexity of the oil pricing regulations which is often compounded by imprecision and vagueness. To a large extent, this is due not only to the magnitude of the regulatory task involved, but also to the hasty manner in which these regulations were drafted and the inability of understaffed agencies such as FEO and FEA to clarify these rules promptly and consistently. As a consequence, a good deal of litigation has arisen in attempting to give these regulations a precise meaning through the enforcement process. The meaning of these regulations to the enforcement offices of DOE, however, often is at odds with the way the industry has interpreted the relevant rules. The industry's interpretation, it is contended, was based on a reasonable reading of the regulation involved and often, assurances from various levels of FEA officials, staff and auditors in the field. Discovery of the interpretations given to its regulations by FEA personnel was thus viewed as an extremely significant aspect of these enforcement proceedings. Some district courts have granted such discovery requests.

In Standard Oil Co. v. DOE, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978), for example, the Temporary Emergency Court of Appeals dealt with, among other things, FEA's rule requiring recovery of nonproduct cost increases. In regulations effective February 1, 1976, FEA announced that producers would be prohibited from recovering nonproduct cost increases before they recovered all product cost increases, as these terms were defined in the regulations. FEA announced that this ruling was implicit in its regulations and applied it both retrospectively and prospectively. Two months later FEA announced that it would not apply the rule prospectively but would continue to apply it retrospectively.

Although FEA claimed that the sequence of cost recovery was implicit in its regulations, it was nowhere explicit and was, in fact, contradicted by advice given by FEA staff to several oil companies. The Court recognized the well established principle "that where administrative regulations are ambiguous on their face, the court should look to the construction which the responsible agency has given to them." *Id.* at 1055. It went on to note, however, that "the weight to be given to an administrative interpretation depends upon 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control.' " *Id.* at 1056. It thus concluded that evidence of the agency's contemporaneous construction of its own regulations was relevant and in this case the agency's construction showed little consistency or thoroughness. Indeed, the court stated that the usual deference given to administrative interpretations simply could not be given in this case.

> This rule is simply not applicable to the FEA's interpretation first announced on February 1, 1976. . . . The FEA relies upon an after the fact interpretation in the preamble to the new rule that, "The order specified in the new Section 212.85 is the same as that under the regulations previously in effect." Yet, it is undisputed that during the relevant period the only public pronouncements were made by officials of the Office of Compliance and the FEA auditors and were contrary to the interpretation set forth in the February 1, 1976 rule.

> . . . [W]e find no basis for according deference to the interpretation of the FEA first announced on February 1, 1976.

Id.

This case is a prime example of the importance of evidence dealing with the agency's contemporaneous construction of the regulations involved. It was initiated by several oil companies in district court seeking declaratory and injunctive relief against DOE. Thus, the companies were able to take advantage of the discovery procedures set forth in federal rules as well as the Court's inclination to interpret those rules broadly in developing their record. It is this kind of broad discovery which the litigants claim is lacking at OHA.

The office of Special Counsel generally has opposed motions for discovery of documents attempting to establish the agency's contemporaneous construction of its regulations. *See, e.g.*, Tenneco Oil Co. v. DOE, 475 F. Supp. 299, 316 (D. Del. 1979). The usual grounds for objection is that they are predecisional, internal agency memoranda which reflect "the mental processes of administrative decisionmakers" (Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)), and therefore, are not subject to discovery. United States v. Morgan, 313 U.S. 409 (1941). Given, however, the uneven history of the oil pricing program, the complexity of its regulations and the general state of flux that has existed ever since they first went into effect, questions involving the proper interpretation of the regulations can be particularly important in these cases. Though OHA initially has been very stringent in its approach to these questions, there are now signs that it has broadened its approach to this problem.

On January 25, 1980, OHA issued an opinion in Atlantic Richfield Co., No. BRZ-0015 (DOE Jan. 25, 1980), dealing with a variety of discovery motions filed by the companies involved. The thrust of these motions was to obtain discovery of the agency's contemporaneous construction of certain key regulations including those involving the proper interpretation of the "property concept," the stripper well property exemption, its applicability to newly designated properties as well as natural gas wells, and the definition of "posted price." OHA's opinion is significant in that for the first time it recognizes the need for this kind of discovery. The opinion attempts to strike a compromise between the extensive and exhaustive requests of the oil companies regarding contemporaneous construction of all regulations applicable to their case and a position that prohibits such discovery as a general matter. In effect, OHA's rule is as follows: "[C]ontemporaneous construction evidence is warranted if a showing is made that the regulation at issue is susceptible to more than one reasonable interpretation and is not given a more specific meaning through formal agency or congressional documents." *Id.* at 50-51.

In applying this approach to the discovery motions at hand, OHA granted several of the company's motions. For example, with regard to the agency's definition of property, a term whose meaning is absolutely basic to the multi-tier system of pricing adopted by the agency, OHA noted:

> Despite the apparent simplicity of the language used in the property definition, no official guidance was provided as to the application of the definition until the issuance of Ruling 1975-15, 40 Fed. Reg. 40,832 (1975), more than two years after the promulgation of the provision. No detailed guidance and no clear statement of the literal interpretation of the property definition was available until Ruling 1977-1 was first issued as a regulatory preamble in August 1976, three years after the crude oil price rule was put into effect.

Id. at 44. It went on to order discovery, concluding:

> Therefore, although we find in the language and history of the property definition and in the overall system for regulating the price of domestic crude oil strong support for a literal interpretation, *we are troubled by the checkered history of this provision.* While this should have been a provision free of doubt, *it is clear that the agency was slow to provide detailed guidance to affected firms despite knowledge that difficulties were being encountered.* We believe, therefore, that in the present proceeding the petitioners *should be afforded every opportunity to demonstrate that the agency's position has been inconsistent and that some meaning other than that described*

pellate judicial review, followed by an opportunity to petition the

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> *in Ruling 1975-15, Ruling 1977-1, and other public pronouncements of the agency is in fact the correct one.* Discovery of contemporaneous agency constructions of the property definition and the applications of the definition contained in the Rulings and the August 20, 1976 Notice will therefore be permitted.

Id. at 48 (emphasis added).

At the same time, OHA was careful not to allow discovery it sees as reopening matters already decided by the courts. Thus, it denied discovery requests with regard to certain regulations affecting stripper wells, noting:

> The Temporary Emergency Court of Appeals has explicitly stated that the regulations always limited the well count to wells that directly yield or produce crude oil and rejected the argument that the regulations could lead to a reasonable expectation that injection wells would be counted as "lacking in merit." . . . The Court has thus determined conclusively that the applicable regulations were not susceptible to more than one reasonable construction.

Id. at 51 (citation omitted).

OHA's opinion is not likely to quell all criticism of its discovery rules. Though it recognizes the principle of contemporaneous construction, it arguably does not go as far as the courts have gone under the federal rules. OHA limits such discovery by excluding statements made by non-policy makers such as auditors or low level FEA staff. According to OHA: "The agency's position may be stated only by those within the agency who have been given authority to formulate significant agency policy. . . . Therefore, the only relevant inquiry concerns official statements by responsible agency officials." *Id.* at 64. This does not go as far as the Court in *Standard Oil* where the statements of staff and auditors in the field were discoverable and admitted into evidence. OHA has reasoned that not only are such persons unable to speak for the agency, but "a requirement that the Office of Special Counsel search thousands of audit files would impose an unwarranted burden on that office." *Id.* OHA's opinion thus concludes:

> A document is discoverable if it was intended for dissemination within the agency and if, after analyzing the issues, it sets forth the considerations supporting the interpretations proposed. This category would include directives from senior officials or from the national office to regional offices of the agency, and other documents that may be said to reflect the effective law and policy of the agency. A responsible officer whose opinions are discoverable is one who has the authority to explain or formulate policy within the agency.

Id. at 65.

Given the relative chaos that marked the beginnings of the oil program, it is arguable how common such reasoned memoranda are. Nevertheless, OHA's recognition of the contemporaneous construction principle is significant. Its desire to draw a line limiting broad requests seeking any and all statements by present and past employees is understandable. The line that it does draw may prevent burdensome discovery requests. But it may also prevent the discovery of the only conflicting interpretations that, in fact, exist. Given that OHA would not accord much or any weight to the statements of those who were not in policymaking positions, drawing such a line may be reasonable. To the extent that a court reviewing OHA's record might give greater deference to the conflicting interpretations of low level staff and auditors, however, prohibition of this kind of discovery could be significant.

On balance, it cannot be said that OHA's position is unreasonable. Arguably, it may be possible to go a bit further so as to ensure a complete record without necessarily being subject to undue delay. In cases where no national level documents of the sort described by OHA exist and the regulations involved are ambiguous, OHA should not rule out completely the possibility of granting further limited discovery of lower level employee state-

Supreme Court for a writ of certiorari, should suffice.[284]

IV

PROCEDURAL RECOMMENDATIONS

If Congress abolishes FERC and district court reviews, then OHA's enforcement procedures must be assessed in a new light. They alone will protect the interests of the parties involved, short of appellate review by the Temporary Emergency Court of Appeals. This section analyzes the adequacy of OHA's procedures and the reforms they suggest in that light, and in terms of their appropriateness for DOE and for purposes of APA reform in general.

Congress and courts have, of late, virtually ignored the informal rulemaking provisions of the APA.[285] Various forms of hybrid rulemaking have developed on an ad hoc, agency by agency basis. The end result is a crazy quilt of rulemaking provisions;[286] however, there has been relatively general acceptance of the APA's adjudicatory model in contexts that require trial-type proceedings.[287] Congress' decision continually to exempt the agencies involved with the administration of the oil program from the adjudicatory provisions of the APA is, thus, somewhat unusual.[288] Though the initial rationale for this exemption was the

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ments and memoranda, particularly if the requests are reasonably specific and would not necessarily involve a general search of all OSC's files. The weight accorded such evidence may not be substantial, however, and may be more significant in cases alleging willful violations than in the typical civil overcharge proceeding.

[284] At present, the primary appellate reviewing court for oil pricing decisions is the Temporary Emergency Court of Appeals. It is not a completely specialized court in that it consists of judges from various circuits who hear the whole range of cases that come to federal court. Similarly, it can sit in various parts of the country and is not restricted to one geographical location. The primary reasons for establishing a specialized appellate court were speed, expertise, and a uniform national policy on oil pricing decisions. A complete examination of the need for, and efficiency of, such a specialized court of appeals is beyond the scope of this Article; however, the merits of continuing this approach, particularly where the emergency program has turned into a long-term regulatory program, certainly are open to question.

[285] *See* Scalia, *supra* note 14, at 348-56, 386-88.

[286] *See* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1313-30 (1972); Williams, *"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 425-36 (1975).

[287] Of course, one of the persistent problems of the administrative process has been the inappropriate use of APA trial procedures to resolve essentially policy issues. *See* Boyer, *supra* note 16, at 111-14; *see generally* Pierce, *The Choice Between Adjudicating and Rulemaking For Formulating and Implementing Energy Policy*, 31 HASTINGS L.J. 1, 27-31, 65-66 (1979).

[288] *See* note 240 *supra*.

temporary, emergency nature of the oil price controls program, this reasoning could not justify continuing the exemption when Congress created the Department of Energy, over four years after the OPEC embargo.

Congress' decision to extend the exemption and, presumably, thereby to preserve agency flexibility[289] resulted in the procedural alternative to APA adjudication set forth in section 503 of the DOE Act. The procedures required by that provision do not radically depart from the conventional application of the APA model;[290] however, they do provide a basis for comparison with the APA. This section focuses on three questions: (1) Does DOE's application of section 503 in remedial order proceedings differ from conventional APA adjudication in terms of the balance struck among such criteria as efficiency, accuracy and acceptability?[291] (2) If so, is this an appropriate balance for DOE enforcement proceedings? and (3) Can we generalize from DOE's experience and thereby suggest APA reforms? For various reasons, some of which are set forth below, the quest for a generally applicable APA is an elusive, but worthwhile goal.

A. *A Uniform Approach*

The differences among agencies should not preclude entirely the search for fundamental procedural similarities. Enforcement proceedings are, for example, common to most agencies. Though the substance of these proceedings as well as the available sanctions vary, it is useful to consider whether these differences can be accommodated under a uniform act like the APA, whether the APA should be amended to ensure greater flexibility in such proceedings, or whether change on an agency by agency basis is a more appropriate way of achieving administrative reform.

There are several reasons why attempting to maintain a more uniform approach to procedure by modernizing and revitalizing the APA can have salutary effects on the administrative process. It might produce a statute that Congress generally would rely on when drafting substantive regulatory legislation. A reliable uniform procedural statute might then stem the present trend toward using procedure as a commodity to be bartered in the political bargaining process.[292] Depoliticizing procedure, thus, might have the effect of encouraging a more productive debate over the substantive complexities of future regulatory programs.[293]

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[289] *See* text accompanying note 170 *supra*.

[290] *See* Byse, *supra* note 38, at 207-09.

[291] It is important to note that although OHA's procedures are not required by § 503, they are in accord with that section's general provisions and thus can be used in this section as a means of analyzing at least one set of the procedures that are allowed under this statute.

Furthermore, while one might argue that the current spate of hybrid rulemaking procedures[294] is the result of necessary procedural experimentation to update the informal rule-making provisions of the APA,[295] such agency by agency experimentation may not be needed when trial type proceedings are, in fact, appropriate. The APA approach in such cases is sound and far more flexible than conventional interpretations usually allow.[296] It should not be abandoned lightly. This does not, however, mean that it cannot be improved. The following sections will examine OHA's procedures with this goal in mind.

Because the appropriateness of trial-type proceedings in enforcement cases turns, in large part, on the nature of the case and the sanctions sought, analysis should begin with a brief examination of APA enforcement proceedings in general, followed by a more detailed analysis of OHA's approach.

B. *Conventional APA Enforcement Proceedings*

The primary purpose of agency enforcement proceedings is to determine whether a particular company or individual has violated the law and, if so, to impose an appropriate sanction. The APA defines sanction very broadly. It includes not only proceedings to impose fines or penalties, but a variety of other remedies including damages and restitution.[297] Regardless of the sanction involved, however, determining whether it should be applied requires the application of law to facts which already have occurred in an attempt to determine "who did what, where, [and] how."[298] Policy reasons inevitably come into play; but with a retrospective fact-finding process, the primary focus of the proceeding is on the alleged violations of agency regulations by a particular party and, thus, on facts usually within the purview of that party.[299]

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[292] *See* Scalia, *supra* note 14, at 400-09 (espousing desirability of uniform procedure, but acknowledging that such a result is very difficult to achieve); *but cf.* 1 K. Davis, *supra* note 207, § 2:19, at 145 (procedural experimentation by courts and legislatures has had desirable effects).

[293] *See* text accompanying note 222 *supra* (substance should be considered prior to procedure).

[294] *See* Hamilton, *supra* note 286, at 1277, 1313-32.

[295] For a discussion of the post-APA changes underlying administrative law and the need for different procedural approaches to accommodate these changes, particularly with regard to informal rulemaking, *see* Scalia, *supra* note 14, at 375-88. *But see* Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review,* 72 Nw. U.L. Rev. 1, 21-23 (1977); 1 K. Davis, *supra* note 207, §§ 6:1, 6:2.

[296] *See* Verkuil, *supra* note 233, at 313-317; note 301 *infra.*

[297] The APA defines sanction as follows:

APA trial-type proceedings are appropriate for enforcement proceedings. The APA provides an opportunity to develop a relatively complete evidentiary record before an impartial decisionmaker.[300] This usually entails an oral evidentiary hearing before an administrative law judge with the burden of proving wrongdoing on the government.[301]

C. *OHA Enforcement Proceedings*

OHA procedures differ from conventional APA adjudication in two primary ways: (1) an oral evidentiary hearing need not be

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"sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action. . . .

5 U.S.C. § 551(10) (1976). *See* Verkuil, *supra* note 233, at 296. Professor Verkuil notes that this definition is overbroad and recommends omitting (B) (F) and (G) from this definition. *Id.* at 296 n. 188. As will be shown, however, there are good reasons to consider narrowing the term even further or in the alternative, providing for more flexible trial-type procedures when certain kinds of "sanctions" are involved. *See* text accompanying notes 324-330 *infra*.

[298] 2 K. Davis, *supra* note 207, § 12:3, at 413.

[299] *See* Cramton, *supra* note 16, at 585.

[300] 5 U.S.C. §§ 554, 556 & 557 (1976). *See generally* Pedersen, *supra* note 238, at 1002-05.

[301] *See* 5 U.S.C. §§ 554, 557 (1976); 2 K. Davis, *supra* note 207, § 10:7, at 332-33. The APA, however, is far more flexible than conventional interpretations would suggest. For example, cross-examination need not be allowed in every case; further, some cases do not require the presence of an administrative law judge. *See* Verkuil, *supra* note 233, at 313-317. Indeed, as § 556 makes clear, the Commission can preside at the initial hearing. Under § 557(b), the Commission also can require that the record be certified to it prior to an initial decision by the presiding officer.

The practice of using staff members as trial judges, however, generally has been discontinued in favor of using administrative law judges. *See generally* Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 Duke L. Rev. 389, 392-93. *See generally* J. Freedman, *supra* note 209, at 161-71.

granted in some cases even when there are material issues of fact in dispute;[302] (2) OHA does not use administrative law judges.[303] Both of these differences offer a basis for considering changes in conventional APA enforcement proceedings. Analysis of these changes cannot, however, take place in a substantive vacuum.

Procedural reforms often have as their catalyst substantive demands that require new modes of implementation and, perhaps, enforcement as well. The complexity, intricacy and the ambitious nature of the regulations involved quite naturally have an effect on the procedures which implement and enforce them. From OHA's point of view, for example, the financial, engineering, and legal questions involved often require more of a team approach to adjudicating contested remedial orders. The expertise of various OHA members, lawyer and non-lawyer alike, are called upon. The model of an aloof, independent solitary judge thus is rejected in favor of a presiding officer, who may or may not be a lawyer and, in any event, is openly assisted from time to time by a team of experts.

Another salient characteristic of these proceedings is that, in the final analysis, even factually complex cases frequently turn on the legal interpretation of complex and often ambiguous regulations.[304] Though the facts are complicated and difficult to sort out, they often are not in dispute.

Finally, in virtually all of the oil pricing cases pending at or decided by OHA, the sanction sought has been a refund of the amount of alleged overcharges, plus interest.[305] Willfulness is not alleged and criminal sanctions are not invoked. Nor are civil penalties or fines sought.[306] The degree of the alleged violator's culpability, thus, is not an issue in the administrative proceeding.[307] The sole question is whether the regulations were violated and restitution is now in order. It is within this substantive and remedial context that OHA's procedures should be assessed.

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[302] *See* note 308 *infra*.

[303] Those presiding at hearings are members of the OHA staff, deputy directors of OHA and often, the director himself. Since OHA utilizes a multi-disciplinary staff that includes not only lawyers, but accountants and economists as well, the presiding officer may or may not be a lawyer. A team approach often is employed. The expertise of various staff members may be called upon in the course of a case.

OHA procedures also differ from the APA in that they allow for discovery. The APA neither provides for nor prevents agency discovery procedures. Application of OHA's provisions, however, has generated considerable controversy. *See* note 47 *supra*. A more detailed examination of these procedures than that set forth in note 47 is beyond the scope of this Article.

[304] *See* notes 324-330 *infra*.

[305] Interview with Anthony Miles, Assistant General Counsel, DOE, in Washington, D.C. (Feb. 28, 1980). This article assumes this amount will, to the extent possible, be returned to consumers.

[306] As one commentator has noted:

1. *Beyond Summary Judgment*

a. Present Procedure. OHA's procedures reflect a policy against unnecessary oral evidentiary hearings. What is necessary or unnecessary, however, is determined primarily from the agency's point of view. Oral hearings are granted only if the presiding officer "concludes that a genuine dispute exists as to relevant and material issues of fact *and* an evidentiary hearing would substantially assist [OHA] in making findings of fact in an effective manner."[308] In deciding whether or not to grant a motion for an oral evidentiary hearing, the presiding officer in an OHA proceeding possesses considerably more discretion than a federal trial judge ruling on a motion for summary judgment under rule 56.[309] Unlike a federal judge, an OHA presiding officer may, in some cases, conclude that despite the fact that there is a material issue

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> With respect to civil penalties, DOE has recognized that it does not have authority to impose such penalties itself and must instead refer such cases to the Justice Department for prosecution in the federal courts [ERA Enforcement Manual (CCH) ¶¶ 55,000, 55,100 (1979)]. However, DOE does compromise, settle and collect civil penalties whenever deemed advisable. 10 C.F.R. § 205.203(b)(2) (1979). A determination of the propriety of seeking civil penalties requires an examination of whether the violation was the result of an "honest mistake," in which event penalties are inappropriate. [ERA Enforcement Manual (CCH) ¶ 55,051 (1979)]. Criteria for determination of the amount of penalties sought to be assessed and whether to negotiate those penalties focus upon the magnitude of the violation, the reasonableness of the offender's conduct and the necessity for deterrence. See [ERA Enforcement Manual (CCH) ¶¶ 55,052, 55,053].

Trowbridge, *supra* note 136, at 209 n.51.

[307] *Id.*

[308] 10 C.F.R. § 205.199(e) (1979) (emphasis added). Pursuant to 10 C.F.R. § 205.199(b) (1979) a litigant desiring an oral evidentiary hearing, shall with respect to each disputed or alternative finding of fact:

> (1) As specifically as possible, identify the witnesses whose testimony is required;
> (2) State the reasons why the testimony of the witnesses is necessary; and
> (3) State the reasons why the asserted position can be effectively established only through the direct questioning of witnesses at an evidentiary hearing.

Cf. 10 C.F.R. § 205.64 (1979) (in exception, rather than enforcement, proceedings the movant must prove that of the several methods of resolving disputed factual issues—submission of written documents, interrogatories, depositions, and evidentiary hearings, in that order of preference—only an evidentiary hearing will be effective in the case at hand).

[309] FED. R. CIV. P. 56. *See generally* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2714 (1973).

of fact in dispute, an oral evidentiary hearing is, nevertheless, unnecessary.

Explicitly granting the agency such discretion makes good sense and represents a useful clarification of the present APA.[310] If an accurate decision can be reached in certain cases without oral testimony, efficiency dictates that the agency have that option available. Moreover, OHA's "summary judgment plus" approach makes it more likely that an agency will deny requests for oral hearings it deems unnecessary than if an ordinary summary judgment rule were in effect.

Reversal of trial court summary judgment decisions are common and relatively easily obtained. Courts have long interpreted rule 56 of the FRCP very stringently.[311] Though there are a number of reasons why courts should treat agency summary judgment decisions differently than those of a federal trial court,[312] agency summary judgment rules hold meaning only if the body exercising them can be assured that its decisions are insulated from mechanical judicial review and consequent reversal on appeal. Given the complexity of OHA enforcement cases and the relative ease of putting at least some issue of fact into dispute, a summary judgment rule tracking federal rule 56 might invite a similarly stringent judicial approach to the agency's summary judgment rule. The Agency would then have little incentive to avoid what it considered an unnecessary hearing: given the likelihood of reversal, the most efficient course would be to hold an oral evidentiary hearing in the first instance.

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[310] 5 U.S.C. §§ 553-558 (1976). The APA provides "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Id.* § 556(d). Presumably, there are cases in which only documentary evidence is required and cross-examination is not necessary for "a full and true disclosure of the facts." This clearly would seem to be the case when no facts are in dispute, but this may not be the case where material issues of fact are in dispute. In any event, § 556(d) of the APA sets forth certain categories of cases in which an oral hearing may be denied, arguably even when there are outstanding factual disputes.

> In rulemaking or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. § 556 (1976). OHA's approach would appear to go one step further. It makes clear that even in enforcement cases seeking restitution where issues of material fact may be in dispute, an oral hearing is not necessarily required.

For a general discussion of the summary judgment approach in agency litigation, see Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971).

[311] *See, e.g.*, C. WRIGHT & A. MILLER, *supra* note 309, § 2716 (appellate court will read record in light most favorable to party opposing motion).

[312] *See generally* Gellhorn & Robinson, *supra* note 310, at 616, 628-31. One major difference is that courts need not worry over depriving a jury of its right to find the facts. In agency adjudication, of course, there are no jury trials.

As Professors Gellhorn and Robinson also point out, however, how a summary judgment rule actually will be applied will differ from agency to agency. *Id.* at 615. Moreover, the presence or absence of agency discovery rules also affects whether or not such a rule can be applied. *Id.* at 617-18. Though there has been a good deal of controversy over OHA's application of its discovery rules in enforcement cases (*see* note 283 *supra*) it would appear that, in most cases, the discovery opportunities authorized by OHA are sufficient to enable a summary judgment approach.

OHA's "summary judgment plus" approach, however, requires a court to determine not only whether there is a material issue of fact involved, but whether the agency properly concluded that an oral evidentiary hearing would not materially assist it in making its findings of fact. The later part of this standard provides the opportunity for a reviewing court to defer to the agency's judgment when determining whether an oral evidentiary hearing would have been appropriate to resolve that issue. Wording the agency's rule so as to encourage more deferential judicial review makes agency summary judgment a more realistic administrative tool.

b. *Present Practice.* In practice, OHA seldom has gone as far as its regulations authorize. In most cases, it has taken a traditional summary judgment approach. Oral hearings usually have been denied because no material issues of fact were in dispute.[313]

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[313] OHA examines the issues which the party desiring the evidentiary hearing wishes to raise in great detail. If the movant does not supply the detailed information required by the regulations his motion will be denied. Karchmer Pipe and Supply Co., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,576 (1979). Armstrong Petroleum Corp., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,538 (1979), Eagle Enterprise, Inc., [1978 Transfer Binder] En. Mngm't (CCH) (2 DOE) ¶ 82,572 (1978).

If OHA finds that there is a genuine factual dispute which is relevant to the issuance of the PRO, the motion for an evidentiary hearing generally will be granted at least as to that particular issue. For example, in Greene's Transport Co., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,505 (1979), OHA granted an evidentiary hearing on the issue of whether the company had voluntarily lowered its prices to its customers in order to refund a portion of previous overcharges. If the company had done this, the amount of the voluntary rebate would offset liability under the PRO. *See also* Mid-Continent Sys., Inc., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,522 (1979). In Time Oil Co., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,512 (1979), OHA granted an evidentiary hearing on whether the class of purchasers in which Time was placed in the PRO was in fact the most appropriate class. In Ross Prod. Co., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,524 (1979), OHA granted an evidentiary hearing to allow the company to introduce factual evidence which was essential to determine whether the company's well was properly classified as not being a stripper well. In J.R. Parten, [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,541 (1979), OHA granted an evidentiary hearing on the geological structure of the tract in dispute. In Boswell Oil Co., [1979

As noted above, this is due to the fact that many of the major battles in recent oil pricing proceedings center on the proper in-

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Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,557 (1979), OHA granted a hearing to permit cross-examination of a law professor on the meaning of a disputed term and to develop contemporaneous construction of Cost of Living Council regulations. *But cf.* Champlin Petroleum Co. [1978 Transfer Binder] EN. MNGM'T (CCH) (2 DOE) ¶ 82,554 (1978) (party may not elicit testimony from DOE officials).

OHA has denied motions for evidentiary hearings on at least five bases. The first is that, although there may be a factual dispute in the case, the dispute is irrelevant to the PRO. For example, in Howell Drilling Inc., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,540 (1979), Howell wanted to introduce evidence that the posted price which DOE used in the PRO was not the highest price paid for oil from the field. OHA said that this fact was irrelevant because DOE determined the posted price in accordance with its regulations. The regulations and not industry practice determine what the correct posted price is. *See also* Glenn Martin Heller, [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,579 (1979); Karchmer Pipe and Supply Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,576 (1979); HNG Oil Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,511 (1979); Mobil Oil Corp., [1978 Transfer Binder] EN. MNGM'T (CCH) (2 DOE) ¶ 82,575 (1978).

The second basis on which OHA has denied a motion for an evidentiary hearing is that the dispute is legal, not factual. For example, in Amerada Hess Corp., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,561 (1979), Hess wanted a hearing to present evidence to dispute the correctness of DOE's position on the types of sales Hess had made and on the burden which complying with the PRO would place on the company. The motion was denied because the dispute over types of sales was one of legal characterization. In addition, Hess offered OHA no alternative, less burdensome means by which to accomplish the enforcement objectives of the PRO. *See also* Glenn Martin Heller, [1980] 6 EN. MNGM'T (CCH) (4 DOE) ¶ 82,579 (June 8, 1979); Monterey Producing Co., [1978 Transfer Binder] EN. MNGM'T (CCH) (2 DOE) ¶ 82,576 (1978).

The third basis on which OHA has denied a motion for an evidentiary hearing is that absent a preliminary showing of bad faith, no inquiry may be made into the mental processes by which agency personnel determined that a PRO should be issued. *See, e.g.,* Karchmer Pipe and Supply Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,576 (1979); Corpus Christi Management Co., [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,539 (1979).

The fourth basis upon which OHA has denied a motion for an evidentiary hearing is that there is in fact no factual dispute in the case. In Lindsey & Elliot, [1978 Transfer Binder] EN. MNGM'T (CCH) (2 DOE) ¶ 82,520 (1978), Lindsey wanted to hold an evidentiary hearing on the nature of production at its well. DOE stated that it did not dispute any of the factual assertions which Lindsey made. There was, therefore, no need for an evidentiary hearing.

The fifth basis upon which OHA has denied a motion for an evidentiary hearing is that little value is expected to come from holding a hearing. In Special Counsel, [1979 Transfer Binder] EN. MNGM'T (CCH) (3 DOE) ¶ 82,519 (1979), the Office of Special Counsel had moved to strike documents from the record as "vague, immaterial, and irrelevant." OHA, while conceding that these documents were of little value, nonetheless denied OSC's motion. It also, however, denied the motion of an intervenor oil company for an evidentiary hearing to cross-examine the authors of the documents. "The time and expense associated with convening an evidentiary hearing for this purpose at this time outweigh the probative value of the evidence that would be adduced." *Id.*

A movant for an evidentiary hearing must demonstrate that evidence of value directly related to the case will come from the hearing. OHA will not grant a motion for an evidentiary hearing if it suspects that delay or a fishing expedition are the prime objectives. "Evidentiary hearings are intended to aid the DOE in deciding demonstrated issues of fact, terpretation of the regulations involved, not on factual disputes.[314] Nevertheless, the rule should not even theoretically give the agency unfettered discretion to deny requests for oral evidentiary hearings when issues of material fact are in dispute. Clear standards and criteria should circumscribe the authority of the agency in deciding when a hearing would "substantially assist . . . in making findings of fact in an effective manner."

In an attempt to meet this need, OHA's opinions have, over time, developed various criteria. OHA will, for example, grant an oral hearing when an issue of material fact is in dispute and its resolution requires an assessment of the credibility of the witnesses involved[315] or an oral hearing will contribute to a better understanding of the issues involved.[316] With regard to this latter determination, OHA has stated that at least three additional factors may come into play: (1) the probative value of the evidence which the firm intends to establish at the hearing; (2) the time and expense involved in holding the evidentiary hearing; and (3) the probability that the evidence can be satisfactorily presented

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not to provide firms with the opportunity to create such issues." Gas del Oro, Inc. [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,526 (1979).

OHA has generally granted motions for evidentiary hearings in remedial order cases. In 1979, OHA decided 19 remedial order cases which contained motions for evidentiary hearings. Of those cases, the motions were granted in whole or in part in 11 cases. The motions were denied in the remaining 8. Two of those opinions, however, expressly allowed the movant to renew his request if examination of documentary evidence provided under the decision did not give the information he sought. Glenn Martin Heller, [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,579 (1979), Corpus Christi Management Co., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,539 (1979). Of the other four, only one of these proceedings had what one might arguably characterize as questions of material fact. HNG Oil Co., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,511 (1979). In the remaining six, the oil companies did not comply with OHA regulations regarding evidentiary hearings. *See, e.g.*, Armstrong Petroleum Corp., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,538 (1979); Karchmer Pipe and Supply Co., [1979 Transfer Binder] En. Mngm't (CCH) (3 DOE) ¶ 82,576 (1979).

[314] *See, e.g.*, Atlantic Richfield Co., No. BRZ-0015 (DOE Jan. 25, 1980). In deciding whether or not to grant discovery of contemporaneous constructions of agency regulations, OHA set forth, in detail, the history of some of the vague, but nevertheless fundamental regulations involved. As this opinion makes clear, much of the recent litigation revolves around the meaning of certain key regulations. *See also* Standard Oil v. DOE, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978); Coastal States Gas Corp. v. DOE, No. 79-2181 (D.C. Cir. Feb. 15, 1980).

[315] *See, e.g.*, Petroleum Management, [1978 Transfer Binder] En. Mngm't (CCH) (2 DOE) ¶ 82,555 (1978).

[316] *See, e.g.*, Atlas Gas Co., [1978 Transfer Binder] En. Mngm't (CCH) (2 DOE) ¶ 82,566 (1978).

and considered through a process other than an evidentiary hearing.[317]

c. *Assessing OHA's Approach*. OHA's criteria help to ensure accuracy and efficiency in the decision-making process. When cases turn on the credibility of the witnesses involved, accuracy is enhanced by live testimony. But when resolution of conflicting facts turns, for example, on resolving a dispute over which accounting methods may or may not be appropriate, neither efficiency nor accuracy is always served by oral testimony. OHA, thus, reserves the right to deny an oral hearing in such cases.

The value of an oral evidentiary hearing, however, usually is assessed differently by the litigants involved than by the agency. From the point of view of the alleged violator, an oral evidentiary hearing is not only a means of building a record, but also an opportunity to persuade and educate the decision-maker. Indeed, the opportunity for advocacy provided by an oral hearing often is viewed by litigants as a significant part of the fairness of the decision-making process. During the course of the hearing, the attorneys involved attempt to determine how the presiding officer views the case, what arguments are likely to prevail or encounter difficulty and, consequently, the approaches to the case that are most likely to increase the possibility of success on the merits. In short, hearings play a role that goes beyond simply compiling a record. They provide an opportunity for the attorneys involved to engage in an extended on-the-record dialogue with the decision-maker.

OHA's procedures, however, provide for oral argument as a matter of right. Thus, even if denied an oral evidentiary hearing, the losing party can argue the meaning of the documentary evidence involved, attempt to explain its significance as well as contend why any factual disputes that may exist should be resolved in its favor. This preserves the advocacy elements of an oral hearing without necessarily confusing this purpose of an oral presentation with the record formulation function such hearings provide. OHA's approach to oral evidentiary hearings thus attempts to balance the needs of the agency to reach an accurate decision in an efficient manner with the litigants' perception of the fairness of the process.

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[317] *See* C & H Refinery, Inc., [1977-1978 Transfer Binder] EN. MNGM'T (CCH) (1 DOE) ¶ 82,561 (1978).

The balance struck by OHA seems appropriate, particularly given the context of these enforcement proceedings. The cases before OHA usually involve corporate entities charged with presumably unintentional violations of complex and intricate pricing regulations. The remedy sought is a form of restitution. In such proceedings, fairness, from the point of view of what will fully satisfy the litigants involved, should be strongly tempered by such competing values as accuracy and efficiency. Unlike a decision to terminate an individual's welfare or social security benefits, a determination that a corporate entity has inadvertently charged an unlawful price for its oil does not directly involve the worth or dignity of a particular human being.[318] Nor can such proceedings be closely analogized to criminal cases. The kind of stigma or social opprobrium that attaches to one convicted of a crime is not likely to be associated with a company that unintentionally violates certain pricing regulations.[319] Though such violations, particularly with regard to large oil companies, are widely publicized and may temporarily affect the company's reputation, this is a far cry from the stigma that attaches to an individual convicted of bank robbery or any serious felony. The effects of such a conviction are likely to follow that individual for the rest of his life. An order requiring a company to refund unintentional overcharges to its customers, however, is not likely to tarnish the company's reputation for the indefinite future. This is particularly true when civil penalties are not sought and degrees of culpability are not involved in the case. Under such circumstances, these proceedings are somewhat akin to those in which the government claims that a rate charged by the company was, in retrospect, too high and now must be refunded.[320]

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[318] *See* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 49 (1976). Professor Mashaw sets forth a number of approaches for determining how much process is due including a dignitary model that is particularly appropriate in welfare or social security proceedings. Of course, individuals within the company who are directly responsible for oil pricing matters may be adversely affected by these determinations in that it may reflect poorly on their performance. Similarly, shareholders and the corporate hierarchy in general may be affected if huge pay back obligations are imposed. This kind of impact, however, substantially differs from welfare or social security cases where a particular person stands to lose the sole or primary basis of his or her livelihood because of an administrative determination.

[319] To some extent, however, the stigma involved will vary with the industry and the violation charged. For example, a charge that an airline has flown unsafe airplanes may have more of an impact on that company's reputation and consequently its future business than a charge that a company has over time unintentionally charged too high a price for its oil. The effects of that violation are dispersed throughout the economy and it is often difficult to identify all or even most of the actual consumers who may have overpaid. In any event, the airline cases are likely to result in a sanction that requires payment of an actual penalty or fine, rather than a form of restitution.

This is not to suggest, however, that the charge that a corporate entity, large or small, has violated the law is not serious or that the interests of corporate litigants are unimportant. The law demands respect whether a violation results in criminal or civil penalties or other sanctions. Agency regulations setting forth maximum prices for the sale of crude oil or, for that matter, the maximum amount of air or water pollution that will be tolerated, represent a collective political judgment to establish certain rules aimed at preventing or at least minimizing the likelihood of a perceived societal harm. Violations are serious. But a charge that a company has unintentionally violated the complex regulations that attempt to carry out such goals usually implies that the company has interpreted differently the regulations' applicability or meaning. At worst, the company may have lacked sufficient diligence in carrying out its legal obligations. Trial-type proceedings are appropriate for such cases, but the procedures employed need not play a symbolic or therapeutic role.

d. *Recommendation.* OHA's "summary judgment plus" approach, coupled with an opportunity to present oral argument as a matter of right, enables an agency to avoid unnecessary oral hearings without unduly prejudicing the rights of the regulated companies involved. This approach would appear to be authorized if Congress were to make section 503 of the DOE Act applicable to OHA.[321] Arguably, OHA's approach might even be authorized under the adjudicatory provisions of the present APA.[322] Given the value of such an approach, however, Congress should consider amending the APA to make this option explicit for all agencies. In so doing, the APA definition of sanction should be re-evaluated.

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[320] For an example of such file and suspend laws, see Natural Gas Act, 15 U.S.C. § 717c(e) (1976). Under that Act companies may file and collect a particular rate, subject to refund after a proceeding to determine its justness and reasonableness. Of course, the price controls approach inherent in the EPAA and its regulations represents a different regulatory approach than the cost of service ratemaking approach utilized under the Natural Gas Act. Nevertheless, the vagueness and complexity of the regulations involved introduce a good deal of uncertainty and discretion in setting the appropriate price. Moreover, the similarities to cost of service ratemaking are more striking when one factors in OHA's exceptions process. As one report has noted with regard to the old FEA approach in this area:

> FEA has established the principle of granting relief from lower tier crude oil pricing restrictions where significantly increased production costs leave a firm with little or no economic incentive to produce crude oil from existing wells on a developed property . . . .
>
> The decision thus represents a substantive determination by FEA to modify the crude oil pricing mechanism for a single firm solely to encourage additional production from existing properties . . . . The procedure necessarily involves regulation of the rate of return on new producing investments.

PRESIDENTIAL TASK FORCE REPORT, *supra* note 18, at 113-15.

e. *Amending the APA.* The present APA's definition of sanction includes not only penalties and fines but a wide variety of other options including "assessment of damages, reimbursement, restitution, compensation costs, and charges in fee." [323] Such sanctions, however, differ in many ways. They differ in terms of their respective degrees of severity as well as the nature of the substantive proceedings necessary to impose them. They also differ in the role the government plays when it seeks to impose them. In a civil proceeding, monetary penalties and fines, for example, generally are viewed as severe, not only because of the dollar amounts that may be involved, but because of the role that the government plays as well as its relationship to private property. The government's role is prosecutorial in nature. Though the long run goal of such cases may be to deter future violations, the primary purpose of the proceeding is punitive in nature. Degrees of culpability, short of willfulness, usually must be determined to assess the appropriate fine.[324] The fine itself represents an authorized taking of private property. In such accusatory cases not only are trial-type proceedings appropriate,[325] but close procedural questions generally are resolved in favor of the accused.[326]

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[321] Section 503 states:

> The Commission shall, upon request, afford an opportunity for a hearing, including, at a minimum, the submission of briefs, oral or documentary evidence, and oral arguments. To the extent that the Commission in its discretion determines that such is required for a full and true disclosure of the facts, the Commission shall afford the right of cross examination.

42 U.S.C. § 7193(c) (Supp. I 1977). The language "oral or documentary evidence" could be read to allow for documentary evidence even when issues of fact are in dispute. This language is, of course, similar to that used in § 556(d) of the APA, but § 503 provides the opportunity for a new and more liberal interpretation of this phrase. Of course, the language "and oral arguments" would appear to make the opportunity for oral arguments mandatory, as is now the case at OHA.

[322] *See* note 310 *supra.* Conventional APA adjudication in enforcement prodeedings, however, usually would provide a hearing if material issues of fact were in dispute. In any event, it is unlikely that APA formal adjudication would require those seeking an oral hearing to make as elaborate a showing of the need for such a proceeding as is now required by OHA.

[323] 5 U.S.C. § 551(10)(E) (1976).

[324] *See* note 306 *supra.*

In a proceeding whose purpose is solely to obtain a refund of alleged overcharges by a particular company, neither willfulness nor degrees of culpability are involved. Though companies involved initially argue that they are in compliance and thus, the government's action similarly can be viewed as an attempted taking of their property, such cases nevertheless differ from penalty or fine proceedings. The underlying premise of these proceedings is that the amount of alleged overcharges in contention arguably belongs to the public, not the company. If the government prevails, what is refunded presumably belonged to the public all along. A taking in the sense of a penalty or fine is not involved, unless one is willing to view the statutes and regulations establishing the maximum prices to be charged as a taking of private property. The income redistribution effects of such statutes and regulations, however, are not particularized in purpose or effect. They are industry-wide in scope and impact and, usually, clearly within Congress' legislative powers.[327]

Furthermore, in restitution proceedings, the government's role is somewhat less prosecutorial in nature and more akin to that of a negotiator or bargaining representative on behalf of the public at large. Overcharge cases represent disputes over the price the public is entitled to pay for crude oil under the law. Due to the complexity and ambiguity of the regulations involved, the resolution of such disputes is by no means a foregone conclusion. Though the aggregate amounts involved can be enormous, the individual amounts often are not significant enough to make private actions asserting overcharges particularly likely or effective.[328] The government's role is primarily to assert and protect the public's interest in resolving such disputes, not necessarily to punish wrongdoing.

In short, restitution, in the context of proceedings involving allegations of unintentional overcharges, can and should be distinguished from penalties or fines. Congress should amend the APA definition of sanction so as to narrow its scope.[329] In the alternative, different categories of sanctions should be established. For sanctions such as restitution the agency should have the option of utilizing more flexible adjudicatory procedures. These should include, at a minimum, the explicit opportunity to make a decision "on the papers" even when material issues of fact arguably may be in dispute.[330]

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[325] *See generally*, Pedersen, *supra* note 238, at 993.

[326] Verkuil, *supra* note 233, at 295. Of course, in cases where penalties are threatened but not imposed, more formal procedures may be necessary even though a lesser sanction ultimately is selected.

[327] The constitutionality of the EPAA was implicitly upheld in Condor Operating Co. v. Sawhill, 514 F.2d 351, 359-62 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975).

[328] *But see* Mode, *supra* note 144, at 102-08. Large purchasers, of course, may have a significant interest in bringing a private action against their suppliers. In general, however, smaller consumers will not.

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[329] One commentator recommends narrowing the scope of the APA definition of sanction where fairness requires adjudicatory procedures, but would retain penalties and fines as well as restitution in the new definition. Verkuil, *supra* note 233, at 296 & n.189, 321-22.

[330] Various bills now pending in Congress seek to amend the APA. *See, e.g.*, S. 262, 96th Cong. 1st Sess. (1979); S. 755, 96th Cong. 1st Sess. (1979); S. 1291, 96th Cong., 1st Sess. (1979). Of particular importance for purposes of this discussion is the fact that both S. 262 and S. 755 incorporate a summary judgment approach at least somewhat similar to that used by OHA. Section 204(c)(3) of S. 262, for example, would provide for the opportunity for a paper hearing even in cases where formal adjudicatory procedures are appropriate. It would amend section 556(b) of the APA by adding the following:

> The presiding employee may require the submission of evidence in written form, or the conduct of cross-examination in written form, if oral presentation of testimony or oral cross-examination is not required for a full and true disclosure of relevant evidentiary facts and a denial of such opportunity for oral proceedings would not materially prejudice such party. Upon the motion of any party, the presiding employee may, prior to the completion of the hearing, issue a decision in the case when there is no genuine and substantial dispute as to any material fact and the moving party is entitled to a judgment as a matter of law.

The present APA makes the opportunity for a paper hearing explicit in "rulemaking or determining claims for money or benefits or applications for initial licenses." 5 U.S.C. § 556(d) (1976). S. 262's amendment makes clear that hearings need not be oral presumably even in enforcement proceedings where formal adjudicatory proceedings usually are appropriate.

The above provision does not explicitly, however, set forth the "summary judgment plus" approach used by OHA. S. 262, does, however, provide for adjudicatory procedures that are more flexible than its amended formal hearings. Section 202(e) sets forth a "general hearing process." This section applies not only to "rulemaking or licensing" proceedings, but to

> any other agency proceeding subject to subsection (a) of this section which the agency determines should be conducted in accordance with the provisions of this subsection after considering such factors as the extent to which the decision is likely to depend on the resolution of genuine and substantial disputes of facts, the number of persons interested in participating in the proceedings, and whether the conduct of the proceeding solely in accordance with subsection (f) of this section is essential to a full and fair disclosure of all material facts.

S. 262, 96th Cong., 1st Sess. § 202(e)(1) (1979).

Though § 202 (e)(A) explicitly excludes proceedings to withdraw, suspend, revoke or annual a license, arguably a restitution case could qualify as a proceeding subject to this more informal approach. It would seem particularly appropriate given the fact that OHA overcharge cases often do not have significant factual disputes. Assuming restitution proceedings qualify for S. 262's "general hearing" processes, § 202(e)(C)(2) of the bill provides:

2. *Administrative Law Judges*

Another significant difference in OHA's adjudicatory approach to remedial order proceedings from conventional APA adjudication is its decision not to use administrative law judges.[331] At times, the presiding officer will be the director or deputy director of OHA; at other times, a staff member will preside and often a panel of two or three individuals will be involved. The presiding

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> In any proceeding subject to this subsection, the agency shall conduct a hearing to afford parties an opportunity to submit for the record such written data, views, or arguments and such responses to the data, views, or arguments submitted by other parties, as the agency or the presiding employee may specify. At the request of any party in the proceeding, the hearing shall include an opportunity for oral argument with respect to such written submissions . . . .

Section 202(e)(C)(3) then goes on to set forth a similar "summary judgment plus" approach:

> (3) At the conclusion of any hearing held pursuant to paragraph (2) of this subsection, the presiding employee shall designate any disputed question for resolution of a formal hearing conducted in accordance with subsection (f) of this section, only if he determines—
>
> > (A) there is a genuine and substantial dispute of fact, including a dispute involving factual assumptions or methodology upon which expert opinion is based, which can only be resolved with sufficient accuracy by the introduction of reliable evidence in formal hearing; and
> >
> > (B) the decision of the agency in the case is likely to depend in whole or in part on the resolution of such dispute.

It is interesting to note that like OHA's regulations, this bill also seeks to insulate agency decisions from mechanical judicial review. Section 202(e)(C)(3) goes on to provide:

> Upon review no court shall hold unlawful or set aside any agency action, finding, or conclusion on the basis of the choice of procedures made by the agency under this subsection, unless such choice was a clear abuse of discretion which substantially prejudiced the rights of the parties.

Unlike OHA's summary judgment regulations, however, Congress requires the presiding officer to justify holding an oral hearing. The officer must state reasons why an oral hearing should, in fact, be held. Section 202(e)(C)(3) provides:

> In making a determination under this paragraph, the presiding employee shall designate in writing the specific facts which are in genuine and substantial dispute, and the reason why the decision of the agency is likely to depend on the resolution of such facts.

OHA's summary approach lends support to such provisions, though it does not go so far as to place a burden of justification of the agency if it decides to hold a hearing. For similar provisions in another bill see S. 755, 96th Cong., 1st Sess. §§ 202-204 (1979).

[331] This is not surprising, given the present arrangement calls for FERC review of OHA decisions. It is not likely, however, that abolition of FERC review will result in OHA's voluntarily using administrative law judges. OHA's approach is based on an interdisciplinary approach to decision-making that envisions a different model than that set forth in the APA. In any event, to the extent that the presiding officers in these cases are members of OHA, this approach would be in accord with the APA. Section 556(b) allows the agency or members that comprise the agency to preside at the taking of evidence.

officer may or may not be an attorney. Indeed, accountants and economists at times also may preside at hearings.

The use of staff as presiding officers and the interdisciplinary team approach to decision making is well suited for a case in which policy issues predominate.[332] In granting or denying requests for exceptions, for example, OHA's approach is particularly appropriate, given the insights an interdisciplinary approach can provide in making the policy judgments that often are involved.[333] Enforcement cases also have a policy component and they can be exceedingly complex. As noted above, however, the primary focus of the proceeding is the determination of past acts and the application of particular regulations to these facts. Conventional APA adjudication usually provides for an administrative law judge in such cases.[334] An examination of the pros and cons of this approach in the context of OHA litigation is in order.

a. *Arguments for the ALJ Approach.* The history of the oil enforcement process has been characterized by controversy and dissatisfaction on the part of the private litigants involved.[335] This dissatisfaction goes beyond what one might naturally expect from the application of pricing regulations to an industry that views such an approach as an unwise philosophy and a counterproductive energy policy. Rather, dissatisfaction with the program's administration goes deeper and dates back to the very beginnings of the oil program.[336] A variety of factors have undermined the petroleum industry's perception of the process' fairness: the informality of early FEO and FEA procedures, the gradual extension of a temporary emergency program administered under emergency conditions to one that has now been in place for nearly ten years, the inability of an understaffed agency, particularly in the early days of the oil program, to articulate clear and comprehensible regulations or render prompt authoritative interpretations of these provisions, the consequent perception on the part of the industry, from time to time borne out by the courts, that enforcement proceedings represented the application of new rules on a retroactive basis, and the fact that even after passage of the DOE Act, oil enforcement adjudication initially remains in the hands of the same agency and, to some extent, the same key personnel that were involved in the early days of the program. Despite the enormous improvement in OHA's present procedures, this legacy remains.

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[332] *See generally* Pedersen, *supra* note 238, at 994-97.

[333] *See* note 15 *supra* (exceptions explained). OHA's exceptions procedures stress flexibility and the expertise of its multi-disciplinary staff. *See* A. Aman, *supra* note 120, at 34. Such an approach seems appropriate, particularly given the policymaking function of the exceptions process. *Id.* at 7-10.

[334] *See* 5 U.S.C., §§ 554, 556, and 557 (1976); Pedersen, *supra* note 238, at 996-1000. For a discussion of the history and functions of administrative law judges, see 2 K. Davis Administrative Law Treatise §§ 10.01-.06 (1958). Of course, even the APA does provide that the agency itself can hear cases in lieu of an initial decision by an ALJ. *See* 5 U.S.C. § 556(b) (1976).

[335] *See* 2 Sporkin Report *supra* note 9, at xxi. *See also* text accompanying notes 156-162 *supra;* Trowbridge, *supra* note 136, at 201-02.

[336] *See* text accompanying note 137 *supra.*

Not all of the problems are historical. The present process has problems in its own right. Dissatisfaction presently centers on OHA's handling of requests for discovery.[337] Though OHA's approach to discovery has broadened considerably, it nonetheless depends, in large part, on how OHA's presiding officer chooses to exercise his discretion.[338] A decision-maker whom the industry views as intimately involved in policy-making or susceptible to influence by policy-makers within the Department may not, from their point of view, be sufficiently independent to compile a full and adequate evidentiary record in an impartial manner. Since many of the key decisions in remedial order cases involve pre-trial discovery and hearing motions, this can be a serious problem. If OHA is the only agency involved in the decision-making process, a completely independent decision-maker would not be involved in the enforcement process until the case reached the courts. The court's function is appellate in nature, however, and that would not provide the protection the litigants desire.

Administrative law judges would introduce a modicum of independence to the decision-making process without completely separating judicial and policy-making functions. An ALJ would ensure an initial decision by one who is neither involved with policy formulation nor dependent on a policy-maker for job security. There would thus be complete independence at the crucial fact-finding and record formulation stage of the proceeding. At the same time, providing for an appeal of ALJ decisions to OHA would retain at least the opportunity for a uniform executive policy.

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[337] *See* note 283 *supra*.

[338] *See* note 281 *supra*.

The use of ALJ's thus would constitute a compromise between the complete separation of judicial and policy-making functions that results with de novo FERC review and the lack of independence that exists if OHA is the sole adjudicator in these proceedings. Similarly, it would provide for independence in the agency's decision-making process, while stopping short of the far more drastic measure of making OHA itself independent and thus creating yet another commission within DOE.

Furthermore, the use of administrative law judges may offer litigants more protection than appellate FERC review. OHA presently compiles the record and FERC plays essentially an appellate role at least to the extent that it has rejected the right of the parties involved to seek de novo review. Given this approach, along with FERC's workload and its relative lack of expertise in the area, FERC, as an independent decision-maker, may not offer as much protection as an administrative law judge. Indeed, the use of ALJ's definitely would prevent what FERC review might not: the possibility of any preconceived OHA policy biases affecting pre-trial decisions at the crucial record formulation stage of the process.

Finally, the use of ALJ's need not result in a serious loss of efficiency in the enforcement process. The summary judgment plus rule should be available as well as a variety of other techniques aimed at providing the presiding officer with substantial control over the proceeding.

b. *Arguments against the ALJ Approach*. There are disadvantages with using ALJ's as well. On the one hand, agencies easily can disregard the administrative law judge's findings of fact and conclusions of law and proceed as if an initial hearing had not been held.[339] Assuming that ALJ decisions are appealable to OHA, it is entirely likely, given that agency's expertise, that ALJ decisions and the record on which they are based would be reviewed de novo.[340]

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[339] *See* Pedersen, *supra* note 238, at 1005-07.

[340] This might not always result in the same decision that OHA would have rendered without an ALJ. The ability to develop a full and complete record before an independent fact-finder may result in an entirely different record than would have been compiled by OHA in the first instance. This may particularly be the case in OHA proceedings if certain discovery requests are more likely to be granted by an ALJ than by an OHA presiding officer, and they arguably compel a different interpretation of the regulations involved. Further, a full record arguably will more likely reveal to a court reviewing OHA's final decision whether it treated the judge's findings arbitrarily.

A related drawback to this proposal is that an initial decision followed by an administrative appeal results in two levels of administrative process, rather than one. Given the fact that OHA would, in any event, thoroughly review the record and issue the final orders in most of these cases, the ALJ stage is unnecessary. To the extent that this is a problem, it can be minimized. OHA need not entertain every appeal, just those in which important policy questions are at stake or clear error on the part of the ALJ is involved. Further, decisions turning primarily on the interpretation of a particular regulation involved could be certified to OHA for decision prior to the initial decision by the ALJ.[341]

A more serious disadvantage to the ALJ approach, however, is the loss of OHA staff expertise that would result if initial decisions were made by a person unlikely to be familiar with the complexities of oil pricing regulations. Arguably, however, even this difficulty can be overcome. The model of a federal judge need not apply in the kind of enforcement proceedings heard by OHA. Given the complexity of the record that is compiled, an administrative law judge often may consult with staff members who are not in any way involved with prosecuting, litigating or investigating the case at bar, particularly on difficult technical or policy oriented questions.[342] Yet, if one is willing to go this far, the OHA team approach may, in fact, be a more appropriate and efficient way of adjudicating such complicated cases.

An accurate decision is more likely to be rendered by an official and staff intimately involved in oil pricing and allocation policy and adjudicatory matters on a daily basis. Though a preconceived policy bias may underlie his or her interpretations of the regulations involved, they are likely to be informed judgments about very complex matters. This is arguably superior to the kind of open mindedness that comes with a lack of any knowledge at all and thus, at least initially, the lack of any pre-conceived policy bias.

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[341] *See* text accompanying note 343 *infra*.

[342] As Professor Davis has pointed out, "the APA imposes no restrictions on consultation by members of agencies with non-investigating and non-prosecuting personnel, but forbids presiding officers to consult 'any person or party on any fact in issue' except in public proceedings. 2 K. Davis, *supra* note 334, § 11.08. Arguably, 5 U.S.C. § 554(d)(1) (1976) which prohibits ALJ consultation of "a person or party or a fact in issue" could be interpreted to allow for consultation with agency staff on facts in issue as distinct from outsiders. *See* 2 K. Davis, *supra* note 334, § 11.17. This interpretation generally has not been adopted by most agencies. Pedersen, *supra* note 238, at 1000 n.38.

Furthermore, internal separation of functions within the agency provides substantial and more than adequate independence for the OHA decision-makers. Ex parte rules prevent any contact with the prosecutorial or investigatory wing of this agency. As noted above, the theoretical susceptibility to influence regarding the application of the proper policy need not be viewed as a fundamental flaw in OHA's approach. The opportunity for policy coherence should be viewed as a positive factor in the decision-making process. Though losing parties invariably will argue with the results of the proceeding, the existence of an opportunity to develop a full and fair record, coupled with a decision supported by substantial evidence and reasons, is more important than the degree to which the decision-maker conforms to traditional notions of what a judge should or should not be. Indeed, the more fundamental problem in such cases may not be whether an ALJ should or should not be employed, but an unwillingness to accord legitimacy to alternative models of what an agency judge should be.

c. *Recommendation.* Due particularly to the history of the oil enforcement program, whether or not OHA should use ALJ's in oil enforcement proceedings is, nevertheless, a close question. For many of the regulated companies involved, the use of ALJ's is essential, particularly if FERC review is abolished. On balance, however, introducing a new set of decision-makers at this stage in the oil program is unnecessary and may even be counterproductive in terms of the accuracy and efficiency of the decision-making process. Allowing decisions to be made by OHA in the first instance would enable this agency to maximize its expertise for the remainder of the oil program. Moreover, unless appeals are taken to some agency other than OHA, thus rendering OHA's expertise in these matters essentially useless, it is entirely likely that OHA will closely examine and often substantially change ALJ decisions with which it disagrees. Interjection of an ALJ for substantive decision-making purposes thus may be an unnecessary and counterproductive stage in the administrative process. Finally, an agency judge need not be totally aloof and detached from the policy-making functions of the agency. In complex, technical cases, the presiding officer should have the benefit of staff expertise.

Abolition of FERC review coupled with a statute mandating the basic procedural safeguards OHA must provide, plus OHA regulations making explicit the standards by which it rules on motions for oral evidentiary hearings and discovery, would ensure the development of a full and fair record. Using OHA personnel does not undermine the development of this record; however, if ALJs are to be used, an alternative approach allowing them to play a role limited to the formulation of the record may be in order. Given the importance in OHA litigation of pre-trial decisions such as how much discovery to allow or whether an oral evidentiary hearing is appropriate, an ALJ could be used to provide an independent, impartial judge to rule on such motions and to supervise the development of the record. The issues presented, however, need not be decided twice, particularly if they ultimately involve the application of regulations to undisputed facts. After such a record has been developed, it could be certified to OHA for a final decision. The ALJ would, in effect, play the role of an administrative magistrate.[343]

d. *Amending the APA.* OHA's experience highlights at least two changes that should be considered in the APA. First, for sanctions such as restitution, the flexibility to utilize more of an interdisciplinary approach, including members of the staff as presiding officers rather than ALJ's should at least be available under the APA. Conventional APA adjudication in such technical proceedings, with primary reliance on an aloof, independent judge may not always be appropriate. Second, Congress should consider amending the APA to encourage broad consultation by ALJ's with agency staff who, of course, are not in any way involved in prosecutorial or investigatory activities with regard to the case at hand.[344]

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[343] The APA presently allows for "the entire record to be certified to it for decision." 5 U.S.C. § 557(b) (1976). Making use of this provision would encourage a prompt final agency decision by omitting the initial decision when it is likely that the agency itself will have the final word. In cases where the ALJ does render a decision, however, review of that decision should not have to be automatic. As S. 262, § 205(c) provides:

> The agency may exercise its discretionary right to review a decision . . . only after determining that—
>
> (A) a finding or conclusion of material fact appears clearly unsupported by the evidence;
>
> (B) the proceeding involves novel or important issues of law or policy;
>
> (C) a necessary legal conclusion appears to be clearly erroneous; or
>
> (D) a clearly prejudicial error of procedure was committed.

Id. § 205(c).

[344] As stated in note 342 *supra*, the present APA already allows presiding officers to engage in substantial consultation with agency staff. S. 262, 96th Cong., 1st Sess., however, would explicitly provide that:

> the agency may designate one or more employees to assist the presiding employee by questioning parties at an oral hearing, or otherwise advising the presiding employee.

D. *Summary*

In summary, the problems of administrative and judicial duplication can be dealt with as follows. Administrative duplication should be eliminated by abolishing FERC review. Though this removes a certain degree of independence from the decision-making process, it is questionable whether total separation of judicial and policymaking functions is, indeed, desirable. In any event, the primary reasons for providing for FERC review no longer exist. OHA has improved its procedures considerably and there is adequate separation of functions within the executive wing of DOE.

But in abolishing FERC review, OHA should not be free to return to the minimal statutory guidance that existed under the Federal Energy Administration Act of 1974. At the very least, the procedures mandated by section 503 should now be applicable to OHA and the standards set forth in its recent decisions over whether to grant or deny oral evidentiary hearings as well as discovery requests should be made explicit in its own regulations.[345] Imposing conventional APA adjudicatory procedures on OHA could minimize the effectiveness of some of its procedural innovations and may go farther than is necessary to ensure fair adjudication in such proceedings. Arguably, the APA would not explicitly allow for a paper hearing in an enforcement case when there were material issues of fact in dispute. Moreover, in cases in which the agency or members thereof did not preside, conventional APA adjudication would utilize administrative law judges. OHA's deviations from conventional application of the APA provide a modest increase in procedural flexibility. On balance, this flexibility should be retained and Congress should seriously consider making some of the procedural options exercised by OHA explicit in an amended APA. Ideally, the APA should then be made applicable to all agency enforcement decisions, including those at DOE.

Id. § 202(e). This may sidestep the restriction on presiding employees consulting with agency staff on "facts in issue." In any event such a provision also may encourage greater use of a more interdisciplinary approach in appropriate cases. Based on OHA's experience with the kinds of cases and issues presented in its enforcement proceedings, Congress should seriously consider encouraging such an approach.

[345] A more detailed statute than § 503 can also be considered, but a more detailed provision may be difficult to pass and, in any event, could result in unnecessary procedural rigidity. Section 503 coupled with OHA regulations implementing this provision, along the lines suggested in this Article and to a large extent already developed by OHA would suffice.

Finally, there is no need for two levels of appellate court review, prior to petitioning the Supreme Court for a writ of certiorari. District court appellate review should be abolished.

CONCLUSION

The administrative process has entered a new age of regulatory reform, one characterized by proposals that seek to achieve fundamental substantive change. New Deal conceptions of and approaches to problems are increasingly under attack. Regulation of competition in the airline, trucking, and communications industries, for example, no longer can be justified by depression-mentality rationales. Competition in such industries is not an evil to be checked, but a positive force generally to be encouraged. Bills seeking to abolish, phase out, or, at least, transform New Deal agencies and legislation are common and some already have passed.[346] Moreover, the need to devise new regulatory approaches to deal with more recent problems such as energy and the environment also has been increasingly apparent.[347]

Fundamental procedural reform should go hand in hand with substantive reform. But to the extent that the political climate that fuels such reforms reflects an increasing skepticism of the efficacy of government, in general, and bureaucracy, in particular, the underlying motivation for substantive reform risks undercutting proposals for constructive procedural change and can encourage excessive checks on agency initiative and action. For example, procedural reforms that seek to streamline over-judicialized administrative processes may be viewed not only as attempts to increase agency flexibility and efficiency, but as proposals to augment agency autonomy and power. At a time when defining the appropriate regulatory role that government should play has become increasingly difficult, proposals viewed in that light may meet with substantial congressional resistance. On the other hand, Congress may be all too eager to adopt reforms that seek to make agencies more accountable and responsive. Such reforms may be laudatory in principle; however, the cumulative effect of legislative vetoes, de novo judicial review of agency rules, sunshine and sunset laws, as well as agency structures that build in checks and balances on administrative action from within agency walls can, if carried too far, result in a modified form of substantive decontrol by procedure. Just as there may be contradictions inherent in a capitalist culture that ultimately may undermine productivity,[348] so too may there be contradictions inherent in a decision-making process that appropriately values public participation and political accountability very highly. Too much participation, or too much political accountability, can undermine essential agency effectiveness.

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[346] *See, e.g.*, Airline Deregulation Act of 1978, Pub. L. No. 94-504, 92 Stat. 1705 (1978) (amends various sections of Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1551 (1970 & Supp. V 1975)). Various deregulation bills dealing with the trucking and communication industries are now pending in Congress. *See, e.g.*, S. 2245, 96th Cong., 1st Sess.; H.R. 6418, 96th Cong., 1st Sess. (bills to decontrol various aspects of the trucking industry). *See also* H.R. 612, 96th Cong., 1st Sess. (bill to deregulate long-distance communications).

[347] *See, e.g.*, C. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 16-27 (1977) (arguing for regulatory techniques such as taxes that rely on the market mechanism to achieve valid environmental goals). Similarly, the phased decontrol of oil prices can be viewed not necessarily as a philosophic commitment to minimum governmental intervention in a competitive industry, but also as the constructive use of the pricing mechanism as a regulatory device to achieve levels of oil conservation that otherwise might not be possible.

Professor James O. Freedman recently has written that "[t]he task of devising an effective theory of the legitimacy of the administrative process is one of the most important challenges facing those concerned with American administrative law and institutions."[349] The increasing uncertainty over government's future regulatory role should not, of course, undermine the search for such a theory, nor should it discourage the development of a theory that recognizes the uniqueness of the administrative process as distinct from more familiar legislative and judicial processes. Moreover, as traditional New Deal regulatory approaches become increasingly open to question and reform, the temptation to use procedure as an indirect means of accomplishing essentially substantive ends must be resisted. Substantive issues and conflict should be faced and, hopefully, resolved directly. In this sense, substantive and procedural regulatory reforms should be kept separate and distinct.

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[348] *See generally* D. Bell, The Cultural Contradictions of Capitalism (1976).

[349] J. Freedman, *supra* note 209, at 266.

Glossary

Throughout this Article various regulatory statutes and administrative agencies are discussed or referred to. Some of these statutes and agencies no longer are in existence, others remain but have new names and still others represent entirely new statutes or administrative agencies. The following is a glossary of agency names and acronyms to assist the reader.

The primary substantive legislation referred to in this Article governing oil pricing and allocation is as follows:

(1) *The Economic Stabilization Act of 1970* (ESA)—This Act established mandatory wage and price controls. These controls, while lifted for the economy in general, were continued on the petroleum industry, in part as a response to the oil embargo and price increases by the Organization of Petroleum Exporting Countries (OPEC).

(2) *The Emergency Petroleum Allocation Act of 1973* (EPAA)—This Act formally authorized the President to establish (and in effect, continue the price controls begun under the ESA) "equitable" prices for domestic crude oil. It has since been amended but is usually referred to in the Article as the EPAA.

The primary organizational statutes that established the agencies discussed are as follows:

(1) *The Federal Energy Administration Act of 1974* (FEA Act)—This Act created the Federal Energy Administration, an executive agency outside the office of the President.

(2) *The Department of Energy Organization Act of 1977*—(DOE Act)—This Act reorganized much of the federal bureaucracy dealing with energy-related problems. It created the new Department of Energy, which consists of a cabinet-level office of Secretary of Energy, various executive units under the Secretary's control or supervision as well as the Federal Energy Regulatory Commission, an independent agency.

The relevant administrative agencies discussed throughout the Article are as follows:

(1) *The Cost of Living Council* (CLC)—the agency that administered the wage and price controls issued under the Economic Stabilization Act or ESA.

(2) *The Federal Energy Office* (FEO)—This was the first executive agency charged with responsibility of implementing and administering the oil price and allocation controls authorized under the 1973 Emergency Petroleum Allocation Act or EPAA. It was established by the President by Executive Order.

(3) *The Federal Energy Administration* (FEA)—Shortly after passage of the Emergency Petroleum Allocation Act or EPAA, the FEO functions were transferred to the Federal Energy Administration (FEA) in 1974. FEA was an executive agency outside the office of the President that continued to administer, implement, and enforce the oil program authorized by the EPAA.

(4) *The Office of Exceptions and Appeals* (OEA)—This was an administrative unit within FEA that was responsible for resolving various adjudicatory matters including contested remedial orders and requests for adjustments or exceptions.

(5) *The Federal Power Commission* (FPC)—This was an independent regulatory commission charged with primary responsibility for the regulation of natural gas and electricity, but, until the energy reorganization required by the 1977 Department of Energy Organization Act took place, it had no authority over oil pricing or allocation.

(6) *The Department of Energy* (DOE)—This is the new department established in 1977 pursuant to the Department of Energy Organization Act (DOE Act). It consists of both an executive wing headed by a cabinet level Secretary and an independent commission that succeeded to the powers of FPC.

(7) *Federal Energy Regulatory Commission*(FERC)—This is the independent commission within DOE which shares power with the Secretary and the executive units under his control or general supervision. FERC essentially replaces the Federal Power Commission. It too consists of 5 commissioners, as did the old FPC, and it retains virtually all of the FPC's authority as well as acquiring some new functions including authority over certain oil pricing and allocation rules made by the Secretary. FERC also reviews adjudications made by the executive.

(8) *The Economic Regulatory Administration* (ERA)—This is an executive unit under the Secretary. In large part, it replaces the FEA. It is charged with oil pricing matters.

(9) *The Office of Hearings and Appeals* (OHA)—This once was a unit within ERA but has since been made an executive agency that reports directly to the Secretary. It, in effect, replaces the Office of Exceptions and Appeals that once was a part of FEA. OHA presently adjudicates contested remedial orders and its procedures are examined in detail in Part IV of this Article.

(10) *Office of Special Counsel* (OSC)—A special enforcement office established to deal with alleged pricing violations by major oil companies. All other enforcement actions of this sort are handled by the Office of General Counsel, also within DOE.

REPORT IN SUPPORT OF RECOMMENDATION 80-3

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THE FEDERAL ADVISORY COMMITTEE ACT IN OPERATION

Michael H. Cardozo*

INTRODUCTION

The use of advisory committees in the United States government started when the government started. George Washington felt the need for advice sufficiently to form a cabinet and convene committees. The members of the president's cabinet are no longer simply "advisers," as they are also the chief executive officers in charge of the operation of their departments. When they meet with the president as a group, however, they are an advisory committee.

The delegates at the Constitutional Convention of 1787–1789 were well aware of the benefits of the advice of others to a head of state. They specified that treaties were to be concluded and major appointments made by the president "by and with the advice and consent of the Senate."

Since then, congressional legislation and executive action have caused the establishment of innumerable advisory committees to aid in the effective administration of programs and activities of the government. Today, even the most vociferous critics of the way advisory committees operate have continued to recognize the importance to the government of advice from outside the ranks of federal officers and employees and members of Congress. When an early version of legislation to regulate committees was introduced in 1957, the report of the House Committee on Government Operations opened with express recognition of the value of advisory committees "as an aid to efficient administration" of the government.[1]

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Report based on a study conducted under a contract with the Administrative Conference of the United States. None of the statements, conclusions and recommendations of the author of this report may be attributed to the Administrative Conference of the United States or any other part of the United States government. Recommendations arising out of this study were acted upon at the plenary session of the Administrative Conference on June 5–6, 1980.

The report of the Special Studies Subcommittee of the House Committee on Government Operations, *The Role and Effectiveness of Federal Advisory Committees*, presented to the House of Representatives on December 11, 1970, concluded that such committees, "a common feature of government,"[2] are "a contribution by the governed to the government,"[3] and added:

> It provides a means by which the best brains and experience available in all fields of business, society, government and the professions can be made available to the Federal Government at little cost. Our Government and leaders are continually in need of advice on a variety of problems at all times in their attempts to find answers to the problems of our increasingly diversified and complex society.[4]

The same committee of the House, when it began studying the need for committee regulation in 1955, stated that "the theory underlying the use of advisory committees is so fundamentally sound that little or no opposition to the device is ever heard."[5] Most advisory committees "are productive organizations which make available to the Government talents which would be unavailable from any other source" was the conclusion in an interesting and deep study of the history and functioning of advisory committees, including a survey of the reactions of many persons who have served on committees, embodied in a doctoral thesis by Gerald J. Kluempke while a degree candidate at George Washington University.[6]

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[1] H.R. REP. No. 576, 85th Cong., 1st Sess. 2 (1956), *reprinted in* SENATE SUBCOMM. ON ENERGY NUCLEAR PROLIFERATION, AND FED. SERV. OF THE COMM. ON GOV'TAL AFFAIRS, FEDERAL ADVISORY COMMITTEE ACT, SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, 95th Cong., 2d Sess. at 45 (1978) [hereinafter SOURCE BOOK].

[2] HOUSE COMM. ON GOV'T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMM., H.R. REP. No. 91-1731, 91st Cong., 2d Sess. 4 (1970) [hereinafter 1970 H.R. REP. No. 91-1731].

[3] *Id.*

[4] *Id.*

[5] SOURCE BOOK, *supra* note 1, at 45.

[6] Gerald J. Kluempke, Proposed Amendments to Federal Advisory Committee Act: Hearings on S. 2947 and S. 3013 Before the Subcomm. on Reports, Accounting and Management of the Sen. Comm. on Gov't Operations, at 395-504 (1976) [unpublished doctoral thesis while degree candidate at George Washington University].

SCOPE OF STUDY

In principle, any group of individuals, however selected or constituted, that considers governmental matters and furnishes views and conclusions to government officials or agencies, is a governmental advisory committee. The Federal Advisory Committee Act (FACA),[7] however, is concerned only with "public advisory committees," that is, groups containing at least some members who are not government employees. Thus, a committee containing any number of officers of government is not covered by the Act unless its membership includes outsiders, representatives of the "private sector." The purely governmental group could be excepted because the Administrative Procedure Act (APA)[8] and the later Government in the Sunshine Act (Sunshine Act)[9] are expected to provide protection from arbitrary and ill-considered action within the government. Many of the procedures specified in the FACA for groups of outsiders "advising" the government have counterparts in the APA and Sunshine Act, guiding the "insiders." Similarly, the Freedom of Information Act (FOIA) of 1974 does for documents what the other two Acts do for meetings, that is, open them to the public.

A kind of advisory body that the FACA does not cover is the group providing "advice" to members of Congress, either to individual members or their committees.[10] Groups of private individuals who provide "advice" to congressional committees may be considered part of the legislative process, with public hearings and the opportunity for others to be heard, furnishing the kind of protection that the FACA, Sunshine Act and APA afford in the executive branch. Similarly, the FACA and the Sunshine Act expressly except the federal courts from their operation,[11] presumably on the assumption that the judicial process must be depended on to furnish procedural protection for anyone affected by it, and in recognition of the reaction that would occur if the collegial deliberations of federal courts were forced into the open. This report will deal with the value of these and other exceptions later.

This study will deal with groups of individuals, existing by whatever name and created by whatever means, whose views and conclusions go to officers (including the president), employees, agencies and bureaus of the executive branch of the government. The study will describe the various functions the groups perform and the areas in which advice is being received and used by the executive branch. It will explore the procedures being followed, whether or not prescribed by the FACA, to protect against abuse, and will conclude with suggestions for any procedural improvements that seem desirable.

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[7] 5 U.S.C. App. I (1976) [hereinafter FACA].

[8] 5 U.S.C. §§ 550–59 (1970).

[9] 5 U.S.C. § 552b (1976).

[10] FACA, *supra* note 7, § 3(3).

[11] FACA, *supra* note 7, § 3(3); 5 U.S.C. § 552b (1976).

PREVIOUS STUDIES, REPORTS, HEARINGS

The published literature on FACA is so voluminous and the commentaries so thorough that there is little more to be said about the need for reform and the remedies recommended.[12] This report will summarize the statements of need and the recommended reforms, and will then comment on the effectiveness of the process developed since passage of the FACA.

STATISTICS

The House and Senate committee members, in considering legislation regulating advisory committees, deplored the lack of accurate figures on the number of advisory committees operating within the government.[13] They estimated that the number in 1970 was something over 3,000,[14] but the lack of definition and absence of adequate registration made any count unreliable. After FACA was passed, the annual reports filed in accordance with the requirements of section 6 (c) of the Act have carried lists of all the committees registered with the Committee Management Secretariat in OMB or GSA, and have named those that were created or terminated during the year.[15] The reports, however, do not list or mention advisory committees that are considered outside the FACA. Hence, there is no count of committees expressly exempted by statute or of groups that no agency considers within their responsibility under the Act.

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[12] A general bibliography on the FACA appears in the Source Book, *supra* note 1, at 349–62.

[13] H.R. Rep. No. 91–1731 (1970), *supra* note 2, at 13–14.

[14] *Id.* at 14.

[15] FACA, *supra* note 7, § 6(c) provides as follows:

> (c) The President shall, not later than March 31 of each calendar year (after the year in which this Act is enacted), make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding calendar year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

At the start of 1971, there were about 1,800 committees listed during the hearings.[16] The Act requires every committee to terminate within two years unless expressly extended by executive act or by statute.[17] By the end of 1974 the number of committees was down to 1,242, with about 25,000 individual members. And by the end of 1978 it was 816, with about 18,000 members,[18] connected with about fifty departments and agencies.[19] In a letter of February 25, 1977, President Carter ordered "a governmentwide, zero-base review of all committees, with the presumption that all committees should be abolished except those (1) for which there is compelling need. . . ." The annual report for 1978 reported 263 committees terminated during that year, while 204 new committees came into existence. In six years the number of committees had been halved. Members of congressional committees and many witnesses before them have reflected a conviction that less is best.[20] Consequently, every reduction in number is considered progress. Whether that conclusion is justified will be the subject of later discussion in this study.

COST OF COMMITTEES

The 1978 Report listed a total of 4,146 committee meetings of all kinds during the year.[21] The Act requires the director of OMB to include "in budget recommendations" funds for the expenses of advisory committees.[22] A total of $68,405,002 of expenditures for committees was reported in the 1978 Report, down almost $5 million from 1977.[23] Most of the costs, of course, involved travel by many of the 22,348 committee members attending one or more meetings.[24] Some of those funds, although a relatively small part, were for the overhead expenses of managing the committees within the departments and agencies. Even the cost of maintaining the committee management officers[25] is relatively small, as most of them seem able to handle the management work in a small part of their working time. Most of their activities on behalf of advisory committees consist of mailings to members and preparing notices of meetings for publication in the *Federal Register*, plus supervising the annual reporting process.

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[16] *Hearings on S. 1637, S. 1964, and S. 2064 Before the Subcomm. on Intergov'tal Relations of the Senate Comm. on Gov't Operations*, 92d Cong., 1st Sess., pt. 1, at 12 (1971).

[17] FACA, *supra* note 7, § 14(a).

[18] Federal Advisory Committees: Third Annual Report of the President Covering Calendar Year 1974, at 3–7 (1975) [hereinafter Third Annual Report].

[19] Federal Advisory Committees: Seventh Annual Report of the President Covering Calendar Year 1978, at 5–13 (1979) [hereinafter Seventh Annual Report].

[20] *Hearings on S. 2947 and S. 3013 Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. 3–6 (1976).

[21] Seventh Annual Report, *supra* note 19.

[22] FACA, *supra* note 7, § 7(e).

[23] Seventh Annual Report, *supra* note 19, at 2; Federal Advisory Committees: Sixth Annual Report of the President Covering Calendar Year 1977, at 2 (1978) [hereinafter Sixth Annual Report].

[24] Seventh Annual Report, *supra* note 19, at 2.

HISTORY OF REGULATIONS

The absence of public control over the members of advisory committees has brought criticism from interests directly and indirectly affected by the committees' activities. An early example of protest is the suit to bar enforcement of codes established under the National Recovery Act of 1933 (NRA). The codes were drafted and promulgated by committees formed by trade associations in each affected industry. In the *Schechter* case, a wholesale dealer in chickens successfully challenged the program as an improper delegation of legislative authority.[26]

The increasing federal pervasion of all aspects of the economy and society has led to an increase in concern for the protection of the rights and interests of individuals and groups affected by federal regulation. As ever more government decisions have been influenced by advisory committees, more questions have been raised about the regulation of their use, composition and continuance. Individuals and organizations not represented, or inadequately represented, on the advisory committees have insisted that their views be heard by the deciding authorities. Increasing influence by industry groups traditionally inclined to engage in activities interfering with free trade led the Department of Justice in the early 1950s to propose standards to guide government agencies to avoid antitrust difficulties in dealing with advisory committees. Those standards have a remarkable similarity to the basic requirements of the FACA of twenty years later.[27] A few years later, bills were introduced in Congress, hearings were held and a bill reported to enact similar standards into statutory law.[28] The committee report accompanying one of those bills, H.R. 7390, stated that its purpose was to avoid a number of specified potential evils:

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[25] FACA, *supra* note 7, § 8(b), calls for an "Advisory Committee Management Officer" in every agency.

[26] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[27] Source Book, *supra* note 1, at 58.

[28] *Id.* at 44–65 and 75–107.

a. Evasion of antitrust laws: to prevent a kind of immunity by estoppel.
b. Committee activities aimed at enlisting "the support of the regulated in the process of regulation": a fox guarding a chicken coop syndrome.
c. Representatives of special interests, rather than the general welfare, exercising the functions of a board of directors usurping the "managerial functions which are the responsibility of the governmental agency": the classical conflict of interest.[29]

The committee recommended a bill that would "clothe these committees with official status and make their proceedings a matter of official record . . . from which the Congress may be kept informed and, therefore, may be better able to give intelligent consideration to the possible necessity for further legislation in this area."[30] Despite objections registered by nearly every executive department, the bill, H.R. 7390, was passed by the House on July 10, 1957, after a lengthy and informative debate and minor amendments.[31] In brief and fairly simple language, inserted as section 15A of the act amending the Administrative Expenses Act of 1946, the bill provided a pattern of regulation for advisory committees that later found its way into presidential executive orders and the FACA itself.[32]

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[29] *Id.* at 44–65.

[30] *Id.* at 48.

[31] 103 Cong. Rec. 11,247 (1957).

[32] H.R. 7390 would have amended the Administrative Expenses Act of 1946 by adding a new section:

> Sec. 15A. (a) No advisory committee or other advisory panel or group (hereafter in this section referred to as an "advisory committee") shall be established in a department unless, not less than thirty days before such advisory committee is established, the head of such department has transmitted to the Speaker of the House of Representatives and the President of the Senate (or if the Congress is not in session, to the Clerk of the House of Representatives and the Secretary of the Senate) a written report setting forth the following information:
>
> (1) If a statute specifically authorizes or requires such advisory committee to be established, the citation of such statute; or if there is no such statute, the authority in law which is relied upon for the establishment of such committee together with the administrative determination that the services of such advisory committee are in the public interest and the reasons upon which such determination is based; and
>
> (2) (A) The number of members on such advisory committee and the area of interest which each member will represent, (B) those members of the advisory committee who will serve without compensation, and those who will receive compensation, (C) the expenses of the advisory committee, or its members, or both, to be paid by the United States, and (D) how long it is anticipated that such advisory committee will function.
>
> (b) Each advisory committee heretofore or hereafter established in any department shall be subject to the following minimum standards:
>
> (1) The agenda for such advisory committee shall be formulated or approved by a full-time salaried officer or employee of the Government.

The Senate did not pass H.R. 7390, but in subsequent years there were, from time to time, efforts in the Senate to take some action on advisory committees. In 1969, a particular target was the Advisory Council on Federal Reports and its sixteen affiliated committees for which it "arranged" the appointment of members.[33] The council had been created to advise on the administration of the Federal Reports Act of 1942.[34] The prime motivation of that Act had been to relieve the burdens on industry, and especially small business, resulting from the proliferation of forms and questionnaires emanating from an ever increasing number of federal regulatory agencies. Regardless of the desirability for coordination of those activities, the senators who in 1969 proposed regulation of the Council and its related committees saw it as "one-sided," providing advice to the government only from representatives "of big businesses" and with the power "to withhold from the public information which it has the right to know . . . ."[35]

While Congress was moving toward statutory regulation of advisory committees, the executive branch was also starting to exercise increased internal control. In 1959 the Office of Management and Budget issued a bulletin entitled *Standards and Procedures for the Utilization of Public Advisory Commissions by Government Departments.*[36] Those

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(2) The meetings of such advisory committee shall be at the call of, and under the chairmanship of, a full-time salaried officer or employee of the Government.

(3) Full and complete minutes of each meeting of such advisory committee shall be kept, which shall contain at a minimum, (A) the name of each member of such advisory committee attending such meeting, (B) a summary of the matters discussed in such meeting stating the viewpoints expressed, and (C) the conclusions reached by the advisory committee.

(4) The functions of such advisory committee shall be purely advisory.

(c) (1) The President is hereby authorized to issue such regulations, not inconsistent with the standards prescribed in subsection (b) or any other provision of law, as he may deem necessary for effective control of the use and activities of advisory committees in departments.

(2) The President shall cause to be prepared annually a public report detailing the membership of each advisory committee used by each department; the functions of each such advisory committee; and the extent to which the operations of each such advisory committee has not complied with the standards prescribed in subsection (b).

(d) This section shall not apply with respect to any advisory committee (1) which consists entirely of full-time salaried officers or employees of the Government, or (2) which is authorized by law to perform administrative or operative functions.

H.R. Rep. No. 576, 85th Cong., 1st Sess., pt. 2 (1957), *reprinted in* Source Book, *supra* note 1, at 71–72 (1978).

[33] *Hearings on S. 3067 Before the Subcomm. on Intergov'tal Relations of the Senate Comm. on Gov't Operations*. 91st Cong., 2d Sess., pt. 2, at 209 (1970) [hereinafter *Hearings on S. 3067*].

[34] 44 U.S.C. 3501–12 (1976).

[35] 115 Cong. Rec. 31,237 (1969).

[36] *Hearings Before a Special Studies Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2d Sess. 29 (1970).

standards and procedures were formally incorporated into Executive Order 11007 of President Kennedy dated February 26, 1962.[37] That order contained "regulations" covering the "formation and use" of advisory committees; the regulations bear considerable resemblance to the provisions of the FACA of ten years later, both in scope and in the rules prescribed for "utilization" of the committees.

On March 2, 1964, two years after the issuance of Executive Order 11007, the Office of Management and Budget promulgated the first version of Circular No. A–63, entitled "Management of Interagency Committees."[38] True to its title, it only covered committees "composed of officers or employees of more than one department or agency of the Government," except that "public advisory committees" covered by Executive Order 11007 would also be covered by Circular A–63 if they had "members from two or more Federal agencies in addition to the public members." Later, Executive Order 11671 of June 6, 1972,[39] superseded E.O. 11007, and, anticipating passage of the FACA, prescribed regulations for all "Advisory Committees" very similar to those in the pending H.R. 4383. When the Act was signed into law on October 7, 1972, Executive Order 11686[40] was issued, revoking and superseding Executive Order 11671, and assigning presidential functions under the Act to the Office of Management and Budget. That assignment was reconfirmed by Executive Order 11769 on February 21, 1974,[41] but the functions were transferred to the administrator of General Services by Executive Order 12024 on December 1, 1977.[42] Meanwhile, Circular A–63 was being revised from time to time. A long and detailed version presented jointly by the OMB and the Department of Justice, and containing many interpretations of unclear provisions in the Act, was released for comment and published in the *Federal Register* on January 23, 1973.[43] (38 Fed. Reg. 2306.) Its origin was described by Deputy Assistant Attorney-General Mary Lawton in a forum on "Secrecy in Government" in 1974.[44] A year later, that version, greatly reduced, was promulgated. This version of A–63, dated March

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[37] 27 Fed. Reg. 1875 (1962).

[38] OMB Circular, No. A–63 Rev., § 3, 39 Fed. Reg. 12,389 (1974), *cited in* SOURCE BOOK, *supra* note 1, at 111–15.

[39] Exec. Order No. 11,671, 37 Fed. Reg. 11,307 (1972), superseded Exec. Order No. 11,007, 27 Fed. Reg. 1275 (1962).

[40] Exec. Order No. 11,671, 37 Fed. Reg. 11,307 (1972), revoked by Exec. Order No. 11,686, 37 Fed. Reg. 21,421 (1972).

[41] Exec. Order No. 11,769, 39 Fed. Reg. 7125 (1974).

[42] Exec. Order No. 12,024, 42 Fed. Reg. 61,445 (1977).

[43] 38 Fed. Reg. 2306 (1973).

[44] *Hearings on S. 2947 and S. 3013 Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess., at 152–53 (1976).

27, 1974, changed the title from a prescription of rules for "interagency committees" to regulations for "Advisory Committee Management." Minor additional revisions appeared in "Transmittal Memoranda" on July 19, 1974, February 5, 1976, and March 7, 1977.[45]

Detailed comparisons of the various executive documents with the statute will appear in other sections of this report, dealing with definitions and scope.

THE FEDERAL ADVISORY COMMITTEE ACT

The studies and hearings in congressional committees that led to the enactment of the FACA really started in 1957 when H.R. 7390 was considered by the House Government Operations Committee and introduced in the House of Representatives. A number of previous acts had contained sporadic attempts to exercise some control over advisory committees; they are described in a report of the Congressional Research Service that introduces the 1978 Source Book on the FACA.[46] During the hearings on the bills introduced in 1970 and 1971, the state of the advisory committee system in the federal government was repeatedly characterized as lacking "adequate guidelines, supervision or direction" and so numerous as to defy accurate counting.[47] The committees concluded, on the one hand, that there were too many "inactive, meaningless, obsolete and redundant committees," wasting staff and operating expenses, and on the other hand, that many committees were so powerful that they, in effect, constituted "a fifth arm of the government" on top of the legislative, executive, judicial and regulatory or administrative branches.[48]

The purpose of the legislation was described in the introductory remarks as having three principal purposes: to eliminate unnecessary committees; to govern the administration of those that remain; and to inform the public about the membership and the activities of the committees.[49] The various executive actions over the previous two decades had the same general purposes, but the members of Congress, after detailed hearings on the subject, concluded that self regulation by the executive branch was not effective. So the Act was passed and signed into law as Public Law No. 92–463 on October 6, 1972.[50] While several bills amending the Act have been introduced,[51] the only amendment that has actually been enacted is a change in subsection (d) of section 10 to incorporate the exceptions described in the Government in the Sunshine Act instead of the exceptions of the Freedom of Information Act.[52]

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[45] Sixth Annual Report, *supra* note 23, at 143; Federal Advisory Committees: Fifth Annual Report of the President Covering Calendar Year 1976, at 145 (1977) [hereinafter Fifth Annual Report]; Third Annual Report, *supra* note 18, at 123.

[46] Source Book, *supra* note 1, at 3–20.

[47] *Id.* at 225.

[48] *Id.* at 293; *Hearings on S. 1637, S. 1964 and S. 2064 Before the Subcomm. on Intergov'tal Relations of the Senate Comm. on Gov't Operations*, 92d Cong., 1st Sess., pt. 1, at 12 (1971).

[49] Source Book, *supra* note 1, at 293–94.

A noteworthy feature of the expression of purpose in the Act itself is the almost complete absence of any express intention to cover two aspects of advisory committees that have become the chief targets of critics: the closing of too many meetings and the lack of balance in the memberships. The statutory statement of purposes refers to need to review the value of the existing and new committees; the importance of keeping Congress and the public informed about their activities; and the importance of "standards and uniform procedures to govern" the establishment, operation, administration and duration of advisory committees.[53] The rest of the Act, after defining the subject, sets forth those standards and procedures.

Definition

The definition of "advisory committee"[54] is crucial to a consideration of the subject, but it has been characterized by a judge confronted with a dispute over its meaning as "broad, imprecise . . . not a model of draftsmanship."[55] The definition reads as follows:

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[50] FACA, *supra* note 7.

[51] *See, e.g.*, S. 1847, 95th Cong., 1st Sess. (1977); and S. 1329, 95th Cong., 1st Sess. (1977), *reprinted in* Source Book, *supra* note 1, at 363 and 373.

[52] 5 U.S.C. § 552b (5) (1976).

[53] Specifically, the findings and purposes of the Act, set forth in § 2, state:

> (a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.
>
> (b) The Congress further finds and declares that—
>
> (1) the need for many existing advisory committees has not been adequately reviewed;
>
> (2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;
>
> (3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;
>
> (4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;
>
> (5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and
>
> (6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

[54] FACA, *supra* note 7, § 3.

> (2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—
>
> (A) established by statute or reorganization plan, or
> (B) established or utilized by the President, or
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.[56]

Section 4 of the Act qualifies the definition to satisfy fairly obvious concerns.[57] Any group established by an act of Congress that specifically makes the FACA inapplicable is excepted by subsection (a). Under subsection (b), the Act is made inapplicable to all advisory committees "established or utilized" by the Central Intelligence Agency or the Federal Reserve System. Similarly exempted is any "local civic group . . . rendering a public service with respect to a Federal program" and any state or local group advising "State or local officials or agencies." By limiting the scope of the Act to committees "established or utilized" by the president or by an "agency" as defined in section 551(1) of Title 5 of the Code, Congress effectively left out committees advising arms of the Congress and the courts.

A key part of the definition of "advisory committee" is the expression "established or utilized." Superficially this means that the origin of the group is not material in determining whether it is an advisory committee covered by the act. It must be a "group," however, meaning more than one person, and someone must being them together. That act, whether done formally or informally, "establishes" the group. However, the Act does not expressly require the establishment to be performed by a government official or agency. Under the strict language of the Act, even a group formed by private industry becomes an advisory committee if it is "utilized" by the president or by one or more agencies of the government. There is internal evidence that the drafters contemplated only governmentally established groups; section 8(a), for example, requires agency heads to establish controls "for advisory committees established by that agency,"[58] and Executive Order 11,007 in 1962 expressly distinguished "industry advisory committees" from committees formed under government auspices.[59]

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[55] Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975).

[56] FACA, *supra* note 7, § 3.

[57] FACA, *supra* note 7, § 4 states:

> (a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.
>
> (b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by—
>
> (1) the Central Intelligence Agency; or
> (2) the Federal Reserve System.
>
> (c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

Whether Congress actually intended to extend the coverage of the Act to groups established entirely at private initiative and by private action remains in doubt and will be discussed later in this report.

ESTABLISHING COMMITTEES

The FACA prescribes the conditions precedent to the establishment of advisory committees by the government. Committees established by private action and then "utilized" by the government naturally did not conform with these prescriptions. The FACA rules governing the establishment of committees cover those created under congressional acts, as well as those established by the president and by other agencies of the government. Since later legislation normally supersedes earlier acts, however, the prescriptions in the FACA for congressionally created committees seem mostly precatory; indeed, later acts frequently expressly exempt new committees from all of the FACA or from such strictures of the Act as the openness of meetings and public access to minutes.[60]

The FACA prescriptions in section 5(b) for the creation of congressional established committees are incorporated by reference in the clause prescribing guidelines for the president, agency heads and other federal officials.[61] The emphasis in these prescriptions is clearly on restricting the number of committees and undue influence by special interests. They seem to reflect more of a suspicion that advisory committees will have evil effects than that they will contribute to the efficient operation of government. Along with several other provisions of the Act prescribing steps to be taken in creating committees, they add up to significant discouragement of new committees.

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[58] FACA, *supra* note 7, § 8(a) specifically requires that

> [e]ach agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Director under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jursidiction.

[59] Exec. Order No. 11,007, 27 Fed. Reg. 1875 (1962).

[60] *See, e.g.*, ERISA, 29 U.S.C. 1001 *et seq.* (1976).

[61] Section 5(b) provides:

For example, subsection 9(a)(2) requires formal, recorded determination by an agency head that creation of a new committee is "in the public interest." Agency heads must consult with the director of OMB and make "timely" publication of the determination in the *Federal Register*.[62] Thereafter, according to section 4(c), a committee may not meet or act until a detailed "advisory committee charter" has been filed with the office exercising governmentwide committee management functions; with the head of the agency to which the new committee reports; with the standing committees of the two Houses of Congress "having legislative jurisdiction" of the agency; and with the Library of Congress.[63] These requirements assure that groups conforming with

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> In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—
>
> (1) contain a clearly defined purpose for the advisory committee;
>
> (2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;
>
> (3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;
>
> (4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and
>
> (5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

[62] According to § 9(a), an advisory committee is forbidden from being established unless it is either specifically authorized by the president or it is "determined as a matter of formal record, by the head of the agency involved after consultation with the Director, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law."

[63] Specifically § 9(c) provides that

> No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Director, in the case of Presidential advisory

the statutory definition of "advisory committee" will not be casually or expeditiously created. In addition, section 14 requires reassessment of the need for each committee every two years; they terminate unless specified authority acts to renew them and again files a charter.[64]

Structure

A committee by any other name—"board, commission, council, conference, panel, task force or other similar group"—is still an advisory committee under the Act, regardless of the number of members or the structure of its organization. Once a group falls within the statutory definition, however, sections 5(b)(2) and 5(c) require it to contain a membership that is "fairly balanced in terms of the points of view represented and the functions to be performed."[65]

Among the recommendations in the Forty-Third Report of the Committee on Government Operations of the House of Representatives[66] was inclusion in advisory committees of more "non-expert" interested and knowledgeable "public members" and "environmentalists, consumers, geographic representatives and noninvolved persons," and it endorsed the requirement of Executive Order 11007 that "industry advisory committees"[67] be reasonably representative of the industries to which they relate. These recommendations are the chief interpretative legislative history of the provisions of the Act that call for "fairly balanced" membership "in terms of the points of

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committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;
(B) the committee's objectives and the scope of its activity;
(C) the period of time necessary for the committee to carry out its purposes;
(D) the agency or official to whom the committee reports;
(E) the agency responsible for providing the necessary support for the committee;
(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;
(G) the estimated annual operating costs in dollars and man-years for such committee;
(H) the estimated number and frequency of committee meetings;
(I) the committee's termination date, if less than two years from the date of the committee's establishment; and
(J) the date charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

[64] *Id.*

[65] Section 5(b)(2), *supra* note 61; section (c) states that "[t]o the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee." *

[66] H.R. Rep. No. 91–1731 (1970), *supra* note 2.

[67] *Supra*, note 59.

view represented and the functions to be performed by the advisory committee."[68] That is a guideline to be "followed by the President, agency heads, or other Federal officials in creating an advisory committee."[69] It also presumably means that a person who feels that his or her point of view is not represented on the committee can take action, such as seeking a court injunction against further functioning or advising until the proper balance has been created.

Another structural prescription in the Act is the requirement of "an officer or employee of the Federal Government to chair or attend each meeting."[70] Similarly, committees may not "hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government."[71] It is not surprising that groups established entirely by private initiative, including research universities, are disturbed when they hear that they may have to submit to this kind of supervision of their deliberations by a government officer whenever they intend to deliver a report that is to be "utilized" by the government.

Subsections 10(a)(1) and (2) of the Act basically require advisory committee meetings to be publicly announced in advance. "Timely" notice of all meetings, "except when the President determines otherwise for reasons of national security," must be published in the *Federal Register*, and sometimes in other media "to insure that all interested persons" receive advance notice.[72] Meetings may be scheduled only "at the call of, or with the advance approval of, a designated officer or employee of the Federal Government." The agenda must have similar official approval.[73]

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[68] *Supra*, note 61.

[69] *Supra*, note 65.

[70] FACA, *supra* note 7, § 10(e) specifically states that:

> There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

[71] *Id.* § 10(f), which provides that "Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee."

[72] Section 10(a)(1) and (2) provide that:

> (a)(1) Each advisory committee meeting shall be open to the public.
>
> (2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Director shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

[73] *See* note 71, *supra*.

When the meeting convenes, a "designated officer or employee of the Federal Government" must either chair the session or be in attendance, and that officer must have the authority to adjourn the meeting whenever it is determined to be "in the national interest."[74]

Every meeting "shall be open to the public" unless "the President, or the head of the agency to which the advisory committee reports," determines, with written reasons, that it is concerned with matters listed in subsection (c) of section 552b of Title 5, U.S. Code, the Government in the Sunshine Act.[75] The exemptions, until 1976, were those listed in the Freedom of Information Act as exempting documents from disclosure. Circular A63, supplementing the statutory requirements for the conduct of meetings, calls for open meetings to be "held at a reasonable time and at a place that is reasonably accessible to the public," and in a room of appropriate size to accommodate the expected number of public participants.

Meeting Procedures

To satisfy the congressional demand for better management controls and oversight, various sections of the FACA prescribe a multitude of procedures that all advisory committees must follow. Within the agency involved, there must be an "Advisory Committee Management Officer" (CMO) who will "exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency." The CMO is also custodian of reports and other papers of the advisory committees. The CMO arranges for publication of the notices of meetings, and handles the determinations that must precede a decision to close a meeting to the public.[76]

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[74] *See* note 70, *supra*.

[75] This clause, set forth in § 10(d), specifically provides that:

> Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code.

[76] FACA, *supra* note 7, § 8 that:

> Sec. 8. (a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Director under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.
>
> (b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—
>
> (1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

The Act, in section 7(a), requires the director of the Office of Management and Budget to establish a Committee Management Secretariat (CMS), with responsibility "for all matters relating to advisory committees." That responsibility was transferred to the General Services Administration (GSA) by Reorganization Plan No. 1 of 1977,[77] and by Executive Order 12024 of December 1, 1977.[78] Pursuant to that order, GSA now maintains the Committee Management Secretariat. It receives and files copies of all committee charters and annual reports. In addition, it administers the annual "zero-based review" required by President Carter of all committees to determine whether they should be continued in existence.[79] The Act itself calls for all committees to terminate within two years of their establishment unless official action is taken to renew them or a statute creating them expressly provided for a longer duration.[80] In the former case the agency must prepare a detailed justification for continuance, and standard forms of reports have been prescribed by the CMS for that purpose. Section 14 of the Act lodges responsibility for "renewing" committees after the annual or two-year review in the president, for presidential committees, and in other officers of the government for other committees. The Committee Management Secretariat, by virtue of the transfer from OMB of the functions under section 7 of the Act, has the responsibility, as part of the annual review, to determine if each committee is "carrying out its purpose," and whether it should be merged or abolished.[81]

There will be further discussion of the operations under these directives later in this report.

CONGRESSIONAL OVERSIGHT

The FACA assigns responsibilities to the "standing committees of the Senate and of the House of Representatives having legislative jurisdiction" over the agencies to which advisory committees report.[82]

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(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

[77] Reorg. Plan No. 1, 42 Fed. Reg. 56,101 (1977).

[78] Exec. Order No. 12,024, 42 Fed. Reg. 61,445 (1977).

[79] Circular A–63, Transmittal Memorandum No. 5, set forth in SIXTH ANNUAL REPORT, *supra* note 23, at 153.

[80] FACA, *supra* note 7, § 14.

[81] *Id.* § 7(b)(1–4).

[82] FACA, *supra* note 7, § 5(a), that:

> In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the

The charter of each new committee must be filed with the relevant committees of the two Houses.[83] Thereafter, those committees are given responsibility, under section 5(a), to make "a continuing review" of the activities of the committees in their jurisdiction, to determine if they should continue in existence, if their responsibilities should be revised, and whether the committee performs a "necessary function."[84] Without any specific assignment in the Act, the Subcommittee on Budgeting, Management and Expenditures of the Senate's Government Operations Committee, when Senator Lee Metcalf of Montana was Chairman, probably exercised more "oversight" jurisdiction over the operation of the Act than all the other standing committees, despite the mandate that they keep committees within their area of responsibility under "continuing review."[85] After Senator Metcalf's death in 1978, interest in oversight diminished, and no general review was made by the Subcommittee in the next session of Congress. Conversations with congressional staff members indicate that other committees seem to have slight concern with their responsibilities under the Act.

THE SCOPE OF THE FACA

The scope of the Act is defined primarily in the "definitions" section.[86] In that and various other sections, some specific kinds of committees and some particular, named, groups are expressly omitted: (1) The Advisory Commission on Intergovernmental Relations, advising federal and state officials "on problems affecting more than one level of government," because of its "unique character," and the Committee on Government procurement, without explanation.[87] (2) Committees of the Federal Reserve System. (3) Certain local civic groups. (4) Committees established to advise Congress or the courts.

The express exemptions are reasonably clear. The problems of scope arise chiefly out of contentions that certain groups either are not

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activities of each advisory committee under its jurisdiction to determine whether such advisory committee shall be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

[83] FACA, *supra* note 7, § 9(c)(2).

[84] Sec. 5(a), *supra*, note 82.

[85] *Id.*

[86] FACA, *supra* note 7, § 2.

[87] H.R. Rep. No. 92–1017, 92d Cong., 2d Sess. (1972), *reprinted in* Source Book, *supra* note 1, at 274.

really "committees" or their activities and responsibilities bring them within specified exemptions.

PRIVATE SECTOR GROUPS

During the hearings that led to the FACA, testimony was presented on a number of committees that gave advice to the government but had been created by private organizations. Sometimes a government official had proposed or advocated the establishment of the committee, but it remained a private entity, with its members all named by the private interests. A conspicuous example was the Advisory Council on Federal Reports.[88] There appeared no tendency on the part of members of the subcommittee to exempt that kind of privately established committee while considering the need for regulation.

The most difficult problem concerns committees, by whatever name the group is called, that are clearly not "established" by any agency of the government, but are "utilized" when an agency officer, or the president, receives reports from them and gives them consideration in making decisions.[89]

Litigation has involved several examples of efforts to include private groups under the Act. Judge Richey of the U.S. District Court in the District of Columbia issued a memorandum opinion holding that meetings or representatives of the distilled spirits industry and of "consumers" who met with the Bureau of Alcohol, Tobacco and Firearms of the U.S. Treasury Department were covered by the FACA and must be open to the public and the press.[90] The judge held that the informality of organization could not be used as a "subterfuge" to avoid the open meeting requirements of the Act.

In *Lombardo v. Handler*,[91] the National Academy of Sciences had created a Committee on Motor Vehicle Emissions to carry out a contract to make studies and report findings to the Federal Environmental Protection Agency (EPA). The Academy held a federal charter by act of Congress, and had entered into contractual arrangements with the EPA to study and report on auto emissions. A nonprofit organization called Public Interest Campaign sought to attend meetings of the committee, but were refused admittance. All meetings of the committee were closed, and other provisions of the FACA were generally treated by the Academy as inapplicable. In the suit, the Academy took the position that its committees were not covered by the Act's definition of "advisory committee." The district court, speaking through Judge John Sirica, agreed, in an opinion that thoroughly reviewed the legislative history. It showed that the version of the legislation that passed the House would have included committees formed by organizations under contract to provide advice to the federal government.[92] The Senate version, however, did not include that kind of committee. In the conference, the present statutory definition was recommended to both Houses. A colloquy on the House floor explained that under the revised definition, the Act would not apply to the Academy, identified by name, despite the contractual relation to the EPA.[93] Consequently, in the opinion of Judge Sirica, "the legislative history of the FACA evidences an apparent intention on the part of Congress to exclude from the coverage of the Act generally groups providing advice to federal agencies pursuant to a contractual relationship, and specifically the committees of the National Academy of Sciences."[94] The judge added that the EPA was "utilizing" the Academy itself, under the contract, more than the committee. He then ruled that, for various reasons, the Academy was a private organization and not an "Agency" of the government whose committees would be covered by the Act.[95]

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[88] *Hearings on S. 3067*, *supra* note 33, at 211 ff.

[89] *See* p. 13 *supra*.

[90] Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048 (D.D.C. 1974).

[91] 397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C.Cir. 1976), *cert. denied*. 431 U.S. 932 (1977).

In *Consumer Union of U.S., Inc. v. Department of HEW*,[96] Judge John Lewis Smith reviewed the legislative history of the FACA and, relying on Judge Sirica's opinion in the *Lombardo* case, reached the conclusion that the purpose being served by committee meetings can determine the applicability of the Act to privately organized groups like those involved in the *AASHTO* and *Food Chemical* cases. The committee involved in the *Consumer Union* case, was appointed by organizations in private industry to meet with the Food and Drug Administration, a U.S. government agency. Because the purpose of the meeting, however, was to let the government officials consider and give agency views on an "ingredient testing program," rather than to receive advice from the private group, the meetings were held not "government advisory committee" meetings and therefore not subject to the FACA.

The *Lombardo* case has not been overruled, so it may still be considered authority for the proposition that committees formed by private, nongovernmental organizations do not become "advisory committees" under the Act simply by "utilization" by a government agency. Arguments to the contrary are still being made, however. In an exhaustive commentary on the FACA by Kit Cage and Samuel S. Epstein,[97] the authors argue that the exclusion of committees that are not "established" by government agencies constitutes "administrative whittling of the FACA's seemingly broad scope" and that Congress should expressly bring them under the Act. In some court actions, the arguments for inclusion under the present definition were successful. In *Center for Auto Safety v. Cox*,[98] the Court of Appeals for the D.C. Circuit affirmed a decision of the district court that the American Association of State Highway and Transportation Officials (AASHTO) was an advisory committee subject to "provisions" of the Act when performing "certain functions" for the Federal Highway Administration (FHWA). The lower court was instructed to "specify more clearly which provisions of FACA" apply to instances of "consultation between FHWA and AASHTO in the interest of obtaining advice or recommendations . . . ,"[99] indicating that the Act was divisible into provisions that are applicable and inapplicable to covered committees. The suit had been instituted by a nonprofit organization, Center for Auto Safety, interested in transportation issues but barred from attending closed meetings of AASHTO. Unfortunately, the court did not mention the *Lombardo* case, so it cannot be determined whether it was disagreeing with the same court's previous ruling when it stated that "when an administrator establishes or utilizes an advisory committee, he must comply with the provisions of the Act; it makes no difference whether the committee is his own creation or a pre-existing group."[100] The court included a footnote stating that the plaintiffs seemed primarily interested in the procedural provisions of FACA requiring open meetings and accurate recordkeeping as "those most logically applicable to advisory committees that are utilized by, but not created by government agencies."[101] The Act itself, however, does not indicate any intention to excuse the "utilized" committees from any of the prescriptions applicable to committees "established by" agencies. Even with the curtailed application of the Act, however, the highway officials decided that they could not operate under the constraints of FACA and the association was dissolved after the decision.

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[92] *Id.* at 798.

[93] *Id.* at 799.

[94] *Id.* at 800.

[95] *Id.*

[96] 409 F. Supp. 473 (D.D.C. 1976).

Support for the kind of divisibility of the Act that the court proposed in the *AASHTO*[102] case has appeared in respected quarters. In the field of standard setting, a great deal of the research, drafting and promulgating is in the hands of committees established by the private industries involved in the products and practices to which the standards are to apply. The procedures of those groups have been explored in depth in a report by Robert W. Hamilton to the Administrative Conference of the United States.[103] Professor Hamilton concluded that "application of many of the provisions of the Federal Advisory Committee Act to such technical committees would be unfortunate."[104] For example, "the mandatory presence of a government employee with power to adjourn the meeting, total agency control over meetings and agenda of each committee, the mandatory deposit of committee records in the Library of Congress, and the mandatory two-year review of the existence of each committee by Congress and the OMB" appeared to him "completely inapt."[105] He agreed that the requirement for open meetings and balanced committee memberships "seem clearly desirable," but he believed that "many committees would refuse to cooperate with federal agencies if the Act were fully applicable to them."[106] He concluded that "the technical committees created by the voluntary standards—writing organizations are . . . not at all like the numerous committees created by federal agencies that were the principal target of the legislators."[107] As a result of this report the Administrative Conference of the United States recommended that Congress amend the FACA to explicitly exempt these "technical committees and standard setting organizations" from the FACA.[108] The basis of the recommendation could be satisfied, however, by exempting the committees only from some particular prescriptions, leaving the key requirements of open meetings and balanced membership in force. Whether or not legislation is needed for this step is discussed later in this report.

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[97] 123 CONG. REC. 7298 (1977).

[98] 580 F.2d 689 (D.C. Cir. 1978).

[99] *Id.* at 694.

[100] *Id.* at 693.

[101] *Id.* at 695.

[102] *See* note 98, *supra*.

The American Industrial Health Council (AIHC) exemplifies the reasons for concern over undue influence by industry and the effort to control that influence by applying the label of "Government advisory committee." The Council was organized late in 1977, about a month after the U.S. Occupational Safety and Health Administration (OSHA) published in the Federal Register proposed new regulations for cancer-causing substances (carcinogens).[109] The reaction of the chemical industry of the nation was to establish an "Ad Hoc Committee" expressly "to mount an offensive" (the words of newspaper accounts) or, in the council's own words, "to assist the U.S. Occupational Safety and Health Administration in developing a rational and practical standard for regulating carcinogens in the workplace."

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[103] Hamilton, *The Role of Non-Governmental Standards—Mandatory Federal Standards Affecting Safety & Health*, 56 Tex. L. J. 1329 (1978).

[104] *Id.* at 1477.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Recommendation 78-4, 44 Fed. Reg. 1357 (1979).

[109] 42 Fed. Reg. 54,148 (1977).

Although an evaluation of the substance of the proposed OSHA regulation and the AIHC objections is not necessary for this study, a summary of the opposing positions may be helpful. OSHA's proposal would have abandoned the previous procedure involving a "substance-by-substance approach." Instead, all suspected carcinogens would be divided into four categories, and "model standards" for regulation would be applied in each category. The industry response primarily objected to the methods proposed for determining that a substance is sufficiently a carcinogen to warrant categorization and subjection to the proposed regulatory scheme. Their criticisms included, for example, the objection that OSHA "is indiscriminate in attributing significance to animal data and extrapolating those data to human exposure."

Within weeks after the publication of the OSHA proposal, representatives of a number of chemical and related industrial concerns responded by forming an unincorporated, loosely structured committee under the AIHC name. The office of the Synthetic Organic Chemical Manufacturers Association (SOCMA) in Scarsdale, New York, was used as headquarters and mailing address for the new group. Messages were promptly dispatched to many individual companies and to several trade associations in the affected industries, explaining the perceived emergency and urging them to join or participate in the new council. Within a couple of months the council was able to report membership of "over ninety companies and sixty trade associations."[110] The membership list included leaders like Abbott Laboratories, Aluminum Company of America, Allied Chemical Corp., Dow Chemical, U.S.A., E.I. du Pont de Nemours & Co., and ICI Americas, Inc. The resources of the group for "advising" the government on subjects of interest to the members must be recognized as virtually unlimited.

After the first year, marked by hasty preparation of position papers, reports and studies, steps were taken to adopt a more formal structure. A certificate of incorporation under the New York Not-for-Profit Corporation Law was executed on April 9, 1979, on behalf of the "American Industrial Health Council, Inc." The certificate was signed by officers of E.I. du Pont de Nemours & Co., Shell Oil Co., Dow Chemical Co., and Diamond Shamrock Corp. Officers of eight companies, including all of those named with the incorporators, were designated as the first board of directors. Among the purposes of the incorporated council is "to cooperate with and assist, for the benefit of its members, United States government bodies and other significant organizations and governmental bodies and persons to insure that legislative and regulatory standards and practices are scientifically sound and economically effective in dealing with chronic health effects." It would be fair to say that those are a lawyer's method of saying that the purpose is "to lobby about health risk regulation." It also suggests an intention to seek to induce government agencies to "utilize" the council in the process of drafting and promulgating regulations.

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[110] AMERICAN INDUSTRIAL HEALTH COUNCIL, BACKGROUND INFORMATION, March 1978.

The bylaws provide that "any corporation, firm or individual engaged in industry or commerce in the United States with an active interest in chronic health effects who, as a member of this Council agrees to pay membership dues . . . is eligible for regular membership in the Council." Any "interested" trade or business association was made eligible for "Association membership." Other provisions of the bylaws contain all the standard provisions for corporations; there is nothing unusual in the bylaws. For example, there is no provision relating to opening meetings to nonmembers, making public the minutes, or publishing notices of meetings, which would have indicated a feeling of responsibility to operate as though the FACA applied.

The AIHC, through its committees, members and associates, presented voluminous documents and testimony to OSHA at a hearing in May, 1978, on the controversial proposed regulation. Other groups, of course, were heard from as well. A little over a year later, OSHA was preparing to issue the proposed regulation in its final form, which, as a result of public comment, will differ from the draft published in 1977.

The chief effect of classifying the AIHC as a government advisory committee instead of treating it as outside the FACA definition, is that, if within the Act, all the activities of the council or its subdivisions concerning the proposed carcinogen regulations would have had to conform with the Act: A "charter" would have had to be approved and filed (the articles and bylaws would hardly qualify); the meetings would have had to be preceded by a public notice over the name of a government official; a government official, with power to adjourn the meetings, would have had to be present, or actually preside, at the meetings; the minutes of the meetings would have had to be filed in designated places; the meetings would have had to be open to the public, unless an exemption could be applied, which is doubtful; and the membership of the Council would have had to be "balanced." The last requirement would mean that a group of private companies and individuals could not freely decide who would be members of a structured organization established by them to formulate positions and recommendations to be considered (utilized?) by a government agency. Obviously, an interpretation of the FACA that has that result would be unacceptable to the affected organizations and individuals.

On the other hand, the activities of the AIHC, and comparable other organizations, are constantly cited as examples of undue influence of business and industry in areas of major concern to consumers and environmentalists, who seek to make them conform to FACA procedures as a measure to balance the influence. That kind of "private" group, not "established" by a federal government agency, was involved in *Lombardo v. Handler*,[111] brought by Public Interest Campaign, an educational and charitable organization concerned about air pollution, to open up a committee of the National Academy of Sciences, deemed nongovernmental; *Food Chemical News, Inc. v. Davis*,[112] brought by a publisher of information on food and health against a government official who met behind closed doors with groups of private industry representatives; and *Consumers Union of U.S., Inc. v. Department of HEW*,[113] brought by a consumers' organization to force a government agency to open meetings held with an association of private industry representatives. During the hearings on the FACA bill before the House Committee on Government Operations on November 4, 1971, the Illuminating Engineering Society was cited by a witness[114] as exercising excessive influence on regulatory agencies in setting standards for the intensity of light needed for various activities in public buildings. All of these instances emphasize the dilemma of reconciling undue industry influence with undue interference with liberty to organize and to speak for private interests.

UNSTRUCTURED, AD HOC GROUPS

Controversy and litigation have surrounded meetings of still another kind of group: the "one-shot meetings," as they have been described by several commentators.[115] The most significant examples were the subject of a suit brought by Ralph Nader to gain admittance to a series of biweekly meetings convened in the White House by the Assistant to the President for Public Liaison.[116] Invited to the meetings were individuals representing major business organizations, senior citizens, professional service firms, church groups, youth and other private sector groups. The purpose of the meetings was to "increase the flow of information between the private groups and the top Executive officials, including the President." Each meeting involved a different group. Mr. Nader was denied admission and sought a declaratory judgment and injunction to require the president's office to comply with the open meetings and other provisions of the FACA.

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[111] 397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert denied*, 431 U.S. 932 (1977).

[112] 378 F. Supp. 1018 (D.D.C. 1974).

[113] 409 F. Supp. 473 (D.D.C. 1976).

[114] *Hearings on H.R. 4383 Before the Subcomm. on Legal and Monetary Affairs of the House Comm. on Gov't Operations*, 92d Cong., 2d Sess. 24 (1971).

[115] *Oversight Hearings Before the Subcomm. on Budgeting, Management, & Expenditures of the Senate Comm. on Gov't Operations*, 93d Cong., 1st and 2d Sess. 5 (1973).

The executive branch, from the time of passage of the Act, has sought an interpretation of the Act's definition of "advisory committee" that would not apply the Act to the kind of meeting involved in the *Nader* case. In the tentative draft of Circular A–63, presented on January 23, 1973, by OMB and the Department of Justice for public comment[117] a guideline was proposed for interpreting section 3(2) of the Act that limited the definition to groups "with fixed membership, usually selected by a federal official" and having "an organizational structure."[118]

The Department of Justice, presumably speaking for the executive branch, consistently adhered to that guideline concerning ad hoc groups. This was confirmed by the testimony of Deputy Assistant Attorney General Mary C. Lawton at the hearings on bills (S. 2947 and S. 3103) to amend the FACA on March 8, 1976, before a Senate subcommittee.[119] Her prepared statement contained this comment:

> Section 2 of the bill would add to the definition of "advisory committee" an express reference to "any ad hoc groups." We have interpreted the existing Act as applying to ad hoc, as well as continuing, advisory *Committees.* See 6(c) of the Act.
>
> The question here is the meaning of "ad hoc group." One possible interpretation, though not the one we have followed, is that the term includes a one-time, informal meeting between a Federal official and a group composed of private persons. If this is the intent of the amendment, we object to it.[120]

The final form of Circular A–63 and its supplements, however, did not contain any interpretation comparable with the draft of subparagraphs (a) and (d); it merely repeated the statutory definition. The draft guidelines, referring to groups with "fixed membership" and having "an organizational structure (e.g., officers) and a staff," would have clearly excluded the kinds of groups involved in the *Nader* case. In deciding that those groups were not covered by the FACA, Judge Gesell quoted the guidelines in the 1973 draft of Circular A–63 and the failure of Congress to voice objections to that construction. He said that "the Act was not intended to apply to all amorphous, ad hoc group meetings . . . not formally organized" and with "little or no continuity."[121] The breadth of the holding is somewhat limited by the statement that the meetings were not only unstructured and informal, but also were "not conducted for the purpose of obtaining advice on specific subjects indicated in advance." They seem, nonetheless, to have been convened to provide advice.

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[116] Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975).

[117] 38 Fed. Reg. 2306 (1973).

[118] 38 Fed. Reg. 2307 (1973).

[119] *Hearings on S. 2947 and S. 3013 Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess., at 85 (1976).

[120] *Id.*

The definition of "advisory committees" is fuzzy as to the intent of Congress to include or exclude private groups "utilized" by government, but not established by any government agency, and "one shot" meetings of unstructured groups. While there are evidences that they were to be included under some preliminary versions of the Act,[122] and some members of House and Senate committees wanted certain of them included, the weight of the evidence is that the ultimate conclusion was to exclude them. This is supported by Judge Sirica's analysis in the case involving the National Academy of Sciences[123] and Judge Gesell's ruling on the White House meetings.[124] The Academy, with its federal charter and contractual relations, is clearly nearer to being a government agency than most private organizations. If it is not an "agency," as the court agreed, and its committees are not "advisory committees" under the Act, surely other, more remote, groups are perforce outside the Act. Similarly, if meetings of prestigious people in the White House are not under the Act, "one shot" meetings at lower levels would be similarly excluded.

Exemptions from Openness

Activities and meetings of committees that are outside the scope of the FACA because not within the statutory definition of "advisory committee" are, of course, free of any of the prescriptions and restrictions of the Act. The meetings, minutes and other records of groups that do come within the definition and therefore are subject to the provisions of the Act, are exempted from the requirement of public access in certain specified circumstances. Section 10(d) of the original Act states that the open meeting provision in subsection (a)(1) of section 10 and the public access requirement in subsection (a)(3) do not apply to any meeting "which the President, or the head of the agency to which the advisory committee reports, determines is concerned with matters listed in section 552(b) of Title 5, United States Code"—which is the exemption section of the Freedom of Information Act.[125] In 1975, Congress included in the Sunshine Act (section 5(c)) an amendment to section 10(d) of the FACA that substituted the Sunshine Act's exemptions for the FOIA's, and limited the exemptions to a "portion of an advisory committee meeting" determined to be within one of those exemptions.[126]

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[121] Nader v. Baroody, *supra* note 116, at 1233.

[122] *See* Marblestone, *The Coverage of the Federal Advisory Committee Act*, 35 FED. BAR J. 119, 121–25 (1976).

[123] Lombardo v. Handler, *supra* note 111.

[124] Nader v. Baroody, *supra* note 116.

Two exemptions that affected advisory committees when the FOIA language was applicable were eliminated by the change to the Sunshine Act: (1) the exemption for "interagency memorandums or letters which would not be available to a party other than an agency in litigation with the agency," and (2) documents containing "geological and geophysical information and data, including maps, concerning wells."[127] The latter could obviously be adequately protected in a meeting context by other exemptions.

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[125] FACA, *supra* note 7, § 10(d).

[126] 5 U.S.C. App. I, § 10(d) (Supp. V, 1975). The following are the present FACA exemptions, as they appear in the FOIA:

> (b) This section does not apply to matters that are—
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> (1) (A) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the indentity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
>
> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
>
> (9) geological and geophysical information and data, including maps, concerning wells.

The former has been the subject of litigation over the proper interpretation of the language, and in *Wolfe v. Weinberger* it was held that an advisory committee cannot also be an "agency," so that documents received by the committee could not become interagency memoranda covered by the exemption.[128] Like the exemption involving geological data, the removal of the exemption for interagency documents does not seem likely to affect advisory committees significantly.

The changes are chiefly aimed at making the language of the exemptions more appropriate for meetings than for documents, which were the focus of the FOIA provisions. The addition of the permission to close a meeting, if opening it would be likely "to disclose information the premature disclosure of which would . . . be likely to significantly frustrate implementation of a proposed agency action,"[129] offers a shaky possibility of avoiding one of the primary complaints about the FACA. Many members of committees have felt that deliberations leading to their final conclusions cannot be sufficiently candid, flexible and thorough if their preliminary views are made public. They feel that advance publicity often makes it impossible to abandon a position. If that feeling can be shown to be likely to frustrate a committee's effort to issue a unified report, perhaps the exemption in subsection 9(B) would provide a way out. An "Interpretive Guide to the Government in the Sunshine Act" warns that public airing of differences among members of a collegial body always presents "these possibilities of frustration," but they are "inherent in the open meeting principle and, at least absent special circumstances, are not grounds for involving exemption 9(B)."[130]

The argument that deliberative sessions seeking a consensus of advisory committee members may be closed was debated in *Schechter v.Weinberger*.[131] The court sustained the position in part. In "oversight" hearings held before Senator Lee Metcalf's subcommittee on November 29, 1973, the Senator entered into the record a letter he had sent to the secretary of HEW protesting against the closing of committee meetings "to protect the free exchange of internal views."[132] He added that there may be situations of emergency where such confidential documents and internal deliberations "between Federal officers" may be necessary, but should be severely limited.[133]

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[127] 5 U.S.C. § 552b(5) and (9) (1970).

[128] 403 F. Supp. 238 (D.D.C. 1973). *See also* Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975); Wu v. NEH, 760 F.2d 130 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

[129] 5 U.S.C. § 552b(c)(9)(B) (1976).

[130] R. BERG AND S. KLITZMAN, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT, at 24 (1978).

[131] 506 F.2d 1275 (D.C. Cir. 1973).

The emergency situations or "special circumstances" that might permit closing a meeting under 9(b) could also bring into play another special exemption written into the FACA. The Act requires that "timely notice" of each meeting of an advisory committee shall be published in the *Federal Register* "except when the President determines otherwise for reasons of national security."[134] The failure to give notice of a meeting is about as effective a means of excluding the public as locking the doors. In a situation where a committee, and especially a presidential commission studying and advising on a matter of grave national import, feels that after all the data are collected and hearings concluded, it needs private deliberations to implement its planned course of action, the combined force of exemption 9(B) and of the president's discretion in subsection 10(a)(2) could justify the requisite in camera deliberations.

CATEGORIES OF COMMITTEES

The advisory committee medium is used in almost every function of the federal government. The list of committees by title in the annual reports reveals the variety in their purpose. In this report, detailed descriptions will be given only of the operations of some representative examples of committees performing diverse functions. A very helpful description of the strengths and weaknesses of particular kinds of committees was given by Professor David S. Brown to the Special Studies Subcommittee of the House Committee on Government Operations.[135]

Advisory responsibilities of committees can be separated into the following functional categories, and any of them may be assigned additional "operational" responsibilities: for policy advice; for technical advice; for fact finding; for evaluation of proposals and applications; for advice in personnel selection.

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[132] *Oversight Hearings on Pub. L. No. 92–463 Before the Subcomm. on Budgeting Management & Expenditures of the Senate Comm. on Gov't Operations*, 93d Cong., 1st & 2d Sess. 20–21 (1973–1974).

[133] *Id.*

[134] FACA, *supra* note 7, § 10(a)(2).

[135] *Hearings on Presidential Advisory Committees Before a Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2d Sess., pt. 2, at 52 (1970) [hereinafter *Hearings on Presidential Advisory Committees*].

Operational Committees

A committee in any of the five functional categories may be assigned an "operational" as well as "advisory" responsibility. "Operational" may be defined, in the words of section 9(b) of the FACA, as the power to make "determinations of action . . . or policy" for matters that come under committee consideration.[136] Under that section they must be given "solely advisory functions" unless Congress or the president expressly gives them other functions. The theory of the FACA, however, as expressed in the "Findings and Purposes," is that the functions of committees covered by the Act "should be advisory only."[137] In practice, committees exercising "operational" functions have been treated by the agencies as outside the scope of the FACA.[138] That interpretation does not seem to be required by the provisions of the Act, but the legislative history gives it some support.[139] The sponsors of the Act seemed to feel that committees exercising operational responsibilities were more like government agencies than advisory committees. Agencies have not been required (by the Sunshine Act) to function and deliberate "in the sunshine" unless they are "headed by a collegial body of two or more members . . . or any subdivision thereof. . . ."[140] A subdivision of that kind of agency, in the form of a committee but with decision-making powers, would be a "collegial body" covered by the Sunshine Act and subject to the open meeting prescriptions of that Act. To require other "operational" committees, not part of "agencies" as defined in that Act, to conform with the prescriptions of the FACA would be unlikely to inhibit their effectiveness any more than committees covered by the Sunshine Act.

Most presidential commissions are created to make available to the president the factual background of a particular problem and to offer the conclusions and recommendations of a group of persons of diverse backgrounds but with the competence to give helpful advice on the particular problem. The value of their work has often been hard to measure. Professor Brown's conclusion is that the success of presidential and other committees depends in part on the qualifications of committee members to perform the assigned functions and in part on the attitudes of government officials toward them.[141] He concluded that the chief value of the committees was their serving as "a useful symbol of the legislator's, the administrator's, and the civil servant's interest in consulting those he is expected to serve."[142]

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[136] FACA, *supra* note 7, § 9(b).

[137] *See* note 53, *supra*.

[138] *Hearings on S. 2947 and S. 3013 Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. 87 (1976).

[139] S. Rep. No. 92–1098, 92d Cong., 2d Sess. (1972), *reprinted in* Source Book, *supra* note 1, at 151.

[140] 5 U.S.C. § 552b(a)(1) (1976).

[141] *Hearings on Presidential Advisory Committees*, *supra* note 135, at 47.

Committees for Policy Advice

Presidential Commissions

Most of the presidential advisory committees are established to help the president and his administration to formulate policies. The following is a list of the committees that seem to fall primarily into this category as of December 31, 1978:

General Advisory Committee on Arms Control and Disarmament
National Advisory Committee for Women
National Commission for Manpower Policy
National Commission for the Review of Antitrust Laws and Procedures
National Commission on Neighborhoods
President's Commission on the Holocaust
President's Committee on Science and Technology
President's Council on Physical Fitness and Sports
President's Export Council
United States Advisory Commission on International Communication, Cultural and Educational Affairs

The value of the presidential committees for providing advice to a president is obvious. A group of carefully selected persons of all relevant backgrounds is invited to meet together, usually with the responsible government officers present. During the life of the committee, they are able to consider the points of view of all segments of the nation's society. The president and his advisers obtain a thorough and balanced finding of facts and recommendation.

Occasionally, of course, the ideal pattern is flawed. That is most likely to result from the committee's producing a report and recommendation that proves to be unacceptable to the president. The Commission on Obscenity and Pornography, with a remarkably balanced membership, issued several reports, based on scientific research, that will clarify the subject for years to come.[143] The permissiveness of the conclusions and recommendations of the commission, however, resulted in flat, though silent, repudiation by President Nixon. This kind of repudiation was cited by the House Committee in 1970 as an added reason for enacting regulatory legislation that would prevent such a glaring waste of money. "Many committee reports and recommendations may be excellent and of great use, but if they receive little or no consideration they have little value," said the House Committee in 1970, citing eight earlier, prestigious presidential commissions.[144] Actually, a conclusion that all eight had great value is equally valid. Their reports contain volumes of carefully sifted factual material and authoritative opinions. They have proven to be of help in all kinds of ways to those seeking solutions to the problems involved in the commissions' work. The presidential repudiation, often arising out of contemporary political considerations, could not cause the results to be valueless and the expenditures to have been a waste of taxpayers' money, even if, like the Obscenity Commission, they cost nearly $2 million.[145]

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[142] *Id.* at 52.

[143] *See, e.g.*, STATEMENT OF CHARLES H. KEATING, JR., COMMISSIONER, COMMISSION ON OBSCENITY & PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY & PORNOGRAPHY (1970).

Political considerations can have effects other than mere burial of a report. When an interim report was made to President Carter in 1978 by the National Advisory Committee for Women, the manner of presentation by the presiding member was so offensive to the president that the substance of the report was wholly obscured in the political recriminations that ensued. This demonstrated the likelihood that members of committees dealing with sensitive policy matters will be more effective if they are not only well qualified by their experiences and background, but can also produce outcomes that can withstand the pressures of strong political winds.

The Warren Commission on the Assassination of John F. Kennedy is probably the best known of the recent Presidential Committees. There is no doubt of the value of the volumes of factual data developed by the Commission.[146] The continuing controversy over the principal conclusion of the Commission, however—that only one person was responsible—shows how difficult it is for a commission to settle factual issues, regardless of the prestige, competence, and balance of its members.

During the hearings in 1970 before the House Special Studies Subcommittee chaired by Representative John S. Monagan of Connecticut that led to his introduction of the bill that led to FACA, a detailed description of the operations and procedures of the National Commission on the Causes and Prevention of Violence, created in 1968, was presented by Lloyd N. Cutler, the Executive Director of the Commission.[147]

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[144] H.R. Rep. No. 91–1731, 91st Cong., 2d Sess., (1970) *cited in* Source Book, *supra* note 1, at 214.

[145] *Hearings on S. 1637, S. 1969 and S. 2064 Before the Subcomm. on Intergov'tal Relations of the Senate Comm. on Gov't Operations*, 92d Cong., 1st Sess., pt. 1, at 6 (1971).

[146] *See* Report of the President's Commission on the Assassination of President Kennedy (1964).

The experience of that Commission, created before the FACA was enacted, provides a guide to the way such a committee operated. Its membership was unquestionably "balanced." While it held many open hearings with opportunity for the public to present views, however, the deliberative and drafting sessions of the membership were not open to the public. They were held before the FACA or the Government in the Sunshine Act was enacted, and its methods reflect the strongly held views that committees cannot operate effectively in public. This subject is treated separately elsewhere in this report.

Other Policy Advice Committees

The utility of a lower level advisory committee in the policy area, established in an agency rather than the White House, and the way the FACA affects it, can be seen in the Secretary of State's Advisory Committee on Private International Law. In 1963 the United States formally became a member of the Hague Conference on Private International Law and the Rome Institute for the Unification of Private Law. Congress authorized appropriations to pay for U.S. participation.[148] Those international organizations had long been engaged in an effort to bring some certainty and unformity in the rules of law applicable to transactions among private persons and organizations in different countries. They arranged international conferences for drafting and proposing uniform legislation or multilateral agreements to bring about effective uniformity of result when issues arise in the various participating countries. Examples of subjects covered are recognition of divorces; sales of goods; enforcement of judgments; extraterritorial service of process; hotelkeepers' relations with guests; and products liability.

In order to help in the formulation of a United States position on each proposal of the two organizations, the Secretary of State established an advisory committee. The American Bar Association, the American Law Institute, the Association of American Law Schools, the American Branch of the International Law Association, the American Society of International Law, the American Society for the Comparative Study of Law, the Conference of [State] Chief Justices, the National Conference of Commissioners on Uniform State Laws, the Judicial Conference of the United States, and the U.S. Department of Justice, in response to the secretary's invitation, named representatives to serve on the committee. The Department of State was represented by the deputy legal adviser, who acted as chairman. Each of the representatives had special experience in the field of private international law; several were the leading writers and scholars in the field. Before and during meetings where the committee discusses particular subjects, expert consultants have been invited to comment on the draft agreements or statutes. For example, in the discussion of the hotelkeepers' contract, counsel for the major hotel chains and for travel agencies were invited to attend and participate in the discussions, as were representatives of consumer and public interest organizations. "Balanced" participation was assured.[149]

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[147] *Hearings on Presidential Advisory Committees, supra* note 135, at 88.

[148] 22 U.S.C. § 269(g) (1970).

After the FACA was passed, the Advisory Committee on Private International Law was duly recognized as covered by the Act and operated under its constraints. No ill effects have been perceived, and the Department of State can feel more secure that it has given every interest a fair hearing. A charter was filed at each place specified in the Act.[150] The charter included a statement that all meetings would be open to the public unless the published notice stated otherwise. The possible grounds for closing a meeting were cited as "5 U.S.C. 552b," which lists all the exceptions to open meetings allowed under the Sunshine Act. They include closing meetings "in the interest of foreign policy," which gives the Advisory Committee enough leeway to close a meeting during a discussion of a United States negotiating position on a controversial policy question. The privilege is seldom invoked, and interested members of the public and of foreign diplomatic missions have attended some of the meetings.

The activities of this Advisory Committee have produced U.S. delegations to international conferences armed with learned analyses of the fields of law involved.[151] It has developed specific proposals for drafting revisions based on thorough consideration of drafts by the nation's best qualified commentators and by those likely to be most affected by the results of the deliberations.

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[149] For a list of the participants in the work of the committee *see* SUBCOMM. ON ENERGY, NUCLEAR PROLIFERATION, AND FEDERAL SERVICES OF THE SENATE COMM. ON GOV'TAL AFFAIRS, FEDERAL ADVISORY COMMITTEES, INDEX TO THE MEMBERSHIP OF FEDERAL ADVISORY COMMITTEES LISTED IN THE SIXTH ANNUAL REPORT OF THE PRESIDENT TO THE CONGRESS COVERING CALENDAR YEAR 1977, (1978) [hereinafter FEDERAL ADVISORY COMMITTEES, INDEX], pp. 210–211.

[150] A copy of the charter, as required by law, is on file in the office of the Committee Management Secretariat, General Service Administration. It is a typical example of the kind of charter that meets the requirements of the Act.

[151] *See, e.g.*, Nadelmann, *Clouds Over International Efforts to Unify Rules of Conflict of Laws*, LAW & CONTEMP. PROB., at 54 (Spring 1977).

Technical Committees

The deep involvement of the government in health, environmental, nuclear and similar matters that are the special realm of trained scientists has created a need for expert technical advice in many agencies. The names of some of the committees alone testify to the need for expertise in providing advice; for example: Clinical Psychopharmacology Research Review Committee; Federal Insecticide, Fungicide and Rodenticide Act Scientific Advisory Panel; Advisory Committee on the Medical Uses of Isotopes; and Lunar Sample Analysis Advisory Committee.[152] The advisory committee device provides the government with the advice of the best qualified scientists at a minimum cost, since they are compensated, if at all, only during the time actually spent in the work of the committees.

One major problem is the inevitable consequence of seeking the services of the best qualified specialists: because of their special qualifications, they are certain to be heavily involved professionally and financially in the area in which their advice is sought. This must lead to conflicts of interest. It emphasizes the importance of careful attention to "balance," to obtain "a diversity of qualified opinions and interests," in the words of Professor Henry J. Steck in a statement prepared for the Senate Committee on Government Operations in March, 1977.[153] In testimony the year before, Professor Steck was particularly critical of committees established by the Food and Drug Administration, which are composed largely of scientific and medical doctors, employed more in academic institutions than in industry.[154]

The operation of a committee providing advice on a highly technical, scientific and health matter is exemplified by a meeting of the Scientific Advisory Panel created under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).[155] The Scientific Advisory Panel was established by section 25(d) of the Act.[156] The administrator of the Environmental Protection Agency is required by that section to submit proposed regulatory action to "an advisory panel for comment on health and the environment." The panel is referred to in section 6(b)[157] as "the Scientific Advisory Panel pursuant to section 25(d)." The requirement of that advice may be waived only when "necessary to prevent an imminent hazard to human health."[158]

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[152] SEVENTH ANNUAL REPORT, *supra* note 19, at 49–89.

[153] *See* note 177, *infra*.

[154] *Hearings Before the Subcomm. on Reports, Accounting & Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. 129–30 (1976).

[155] 7 U.S.C. § 136–136y (1976).

[156] 7 U.S.C. § 136w(d) (1976).

[157] 7 U.S.C. § 136b(2) (1976).

A notice of an open meeting to be held on February 14 and 15, 1979, of a subcommittee of the panel appeared in the *Federal Register* on January 29, 1979, the agenda being "Label Development" and "Experimental Use Permits."[159] On February 7, another notice appeared, announcing that a "regular meeting of the Panel" would "formally convene" in the afternoon of February 14 at the EPA office to complete review action for "conclusion of the rebuttable presumption against registration (RPAR) or pronamide."[160] The purpose of that session was explained, during the meeting, as providing an opportunity for more public comment on a proposed regulation, and in particular by a manufacturer of pronamide. Five members of the panel were present, and about twenty-five other people were in the room.

The meeting started with a description of the regulation that was being recommended to the Administrator by the panel. A representative of the manufacturing concern, who was accompanied by several scientists and a lawyer for the firm, was seeking modification of the recommended regulation. The presentation by the concern demonstrates the nature of the proceedings. Documents already before the panel purported to show that:

1. The substance should not be deemed a carcinogen because the only evidence was that it sometimes caused liver cancer in male mice;
2. The time that must elapse between application of pronamide to transplanted lettuce and alfalfa and harvest, in order to reduce the residue to one part per million, can be forty-five days instead of the proposed sixty days;
3. The requirements of both prescribed packaging (i.e., water soluble bags) and protective clothing for applicators is not necessary;
4. The proposed label that it is "For commercial use only; not for home use" should be amended; and
5. There was no persuasive evidence that milk in market baskets contained excessive traces of the substance even if the cows had eaten alfalfa sprayed with the formula.

The members of the panel, who had heard or read all the scientific evidence in the panel's files, commented on the presentation, and, after discussion, stated their conclusion that they would recommend the regulation as drafted.

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[158] *Id.*
[159] 44 Fed. Reg. 5712 (1979).
[160] 44 Fed. Reg. 7809 (1979).

The curricula vitae of the members of the panel were impressive; their affiliations were: Secretary, Boyce Thompson Institute for Plant Research at Cornell University; Chairman, Department of Epidemiology and Public Health, University of Miami School of Medicine; Professor of Pharmacology and Toxicology, University of Kansas Medical Center; Professor of Biology, Entomology and Environmental Studies, Department of Entomology, University of Illinois at Urbana-Champaign; Director, Center in Toxicology, Vanderbilt University School of Medicine; and Professor and Chairman, Department of Pathology, School of Medicine, University of California.[161] All were scientists with elaborate credentials in education, scholarship, publications, positions held and consulting affiliations, with particular relevance to pesticide technology. Three had doctorates of both medicine and philosophy. There could be no question of their competence or, from the published biographies, absence of financial interest in any involved substance or business. They were selected intentionally because of their lack of involvement in business, which meant, of course, that the panel lacked one aspect of the "balance of interests" that the FACA prescribes for advisory committees generally. The FIFRA provides that the members of the panel are to be appointed by the Administrator from among six nominees of the National Institutes of Health and six of the National Science Foundation.[162] There was no requirement of members from "consumers" or industry. The Administrator is to "promulgate regulations regarding conflicts of interest" among members of the panel. Obviously, a panel "balanced" with some members from the industry that manufactures the substances being controlled, however, would involve some conflicts of interest. In this kind of committee, the FACA requirement of balance clashes with efforts to avoid conflicts of interest. Perhaps full disclosure of all involvements is an adequate prophylaxis.

Fact Finding

Committees in the "fact finding" category, are usually those charged with determining the facts giving rise to a special incident, such as an accident or a popular outcry. Committees giving technical advice are, of course, partly "fact finding." This category of committee generally is expected, in addition, to advise on remedies and policies that will ameliorate the situation or prevent an undesirable recurrence. Examples are the President's Commission on the Three Mile Island incident

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[161] The panelists and their affiliations are identified in FEDERAL ADVISORY COMMITTEES, *supra* note 149, at 241.

[162] 7 U.S.C. § 136w(d) (1976).

(1979) and the National Commission on the Causes and Prevention of Violence (1969). The former was charged with determining the cause of the breakdown and threats to public safety of the nuclear energy plant at Three Mile Island in Pennsylvania. The latter was created in 1968 following the assassinations of Robert F. Kennedy and Martin Luther King, Jr., and was operating when the Chicago disorders of the summer of 1968 occurred. In its own words its charge was to make "a penetrating search for the causes and prevention of violence—a search into our national life, our past as well as our present, our traditions as well as our institutions, our culture, our customs and our laws."[163]

The members of the Commission on the Causes and Prevention of Violence were described by Lloyd Cutler, its executive director, as a group which "did box the political compass and include representatives of virtually every group and segment of thought in the country,"[164] including four "distinguished" members of the House and Senate. The chairman was Dr. Milton Eisenhower, and all the members "worked very hard" and "developed an independence of thought and really an independence of being directed or influenced by those who had appointed it."[165]

The Violence Commission, after eighteen months of work, published its reports and fifteen separate volumes of staff research and investigative reports. Mr. Cutler's testimony before the subcommittee considering the regulation of advisory committees in 1970 contains an excellent summary of the processes and effectiveness of this kind of commission. It also reveals some of the reasons for the continuing criticism of the advisory committee process:

> What are the results of the enormous expenditure of time and effort which went into the total work product of the Eisenhower Commission?
>
> In trying to answer this question I would draw a distinction at the outset between the findings of a presidential commission and its recommendations. Presidential commissions have two quite different kinds of functions. One is to present significant facts about national problems to the members of the public and their elected leaders, and the other is to make policy recommendations to officials at various levels of government. In order to assess correctly the results of a presidential commission I think it is important to look at each of these two functions separately.
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> In stressing the independent significance of Commission fact finding I do not want to leave you with the impression that I consider Commission policy recommendations to be an exercise in futility. On the contrary, I think that the governmental response to Commission recommendations has been

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[163] *Hearings on Presidential Advisory Committees, supra* note 135, at 114.
[164] *Id.*
[165] *Id.*

more constructive than has been generally recognized and could be even better if appropriate kinds of follow-up groups could be established for the major presidential commissions.

* * *

. . . the Commission swiftly and unanimously reached agreement on the fundamental conclusions drawn from its study—that the causes of violence are deeply rooted in our institutional failures to correct social injustice as well as in the weakness of the law enforcement system, and that the prevention of violence required a two-pronged approach aimed at making resort to violence unnecessary as well as unrewarding. That is why we called our final report "To Establish Justice, To Insure Domestic Tranquillity." To achieve these twin goals, we recommended, first, that national priorities should be revamped so that expenditures for general welfare purposes could increase relative to military expenditures, and, second, that we sharply increase our investment in the criminal justice system and transform it from a nonsystem of overlapping and uncoordinated agencies into a well-managed and efficient whole. In December of 1969, we published our final report, consisting basically of a summary statement of conclusions together with the edited versions of the separate papers we had issued over the preceding months.

* * *

But it remains true that, on the whole, Commissions burst on the scene and then pass from public view like comets, only to appear again in much the same form years or even decades later. The reports of the 1930 Wickersham Commission, the 1965 Katzenbach Commission and the 1969 Eisenhower Commission differ merely in details so far as the subjects of crime and law enforcement are concerned, not in the central thrust of their analyses and recommendations. As Kenneth Clark so vividly reminded us, the report of the Kerner Commission largely mirrored the reports on the 1919 riot in Chicago and the Harlem riot of 1935. One of the scholars we consulted remarked, not wholly in jest, that we should study the violence induced by the frustrations resulting from the publication of so many excellent prior reports and the public failure to respond.

We have no ready solution for this problem. In our own report we recommend that the President request a group of leading private citizens to constitute themselves as a National Citizens Justice Center, to serve as a continuing presence to examine the workings of the criminal justice system and as a catalyst for achieving the reforms we so urgently recommended. Perhaps much could be gained if the British tradition were adopted here. In Britain, the publication of each Royal Commission report is usually followed within 6 months to a year by the publication of a Cabinet white paper setting forth the Government's views on the Commission's recommendations and the Government's proposals, if any, for action. Although 6 months have passed since our final report was filed, the administration has so far made no public response. Perhaps we would also benefit by creating a private committee consisting of the chairmen of the most important past Presidential commissions, whose combined prestige and experience in studying the critical problems of our time might enable them to awaken the conscience of the country, and give focus to our national will.[166]

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[166] *Id.* at 113–18.

Concern over the failure of the government to profit from the work of fact-finding commissions has often reappeared. The General Accounting Office, in 1977, reported to the House Committee on Government Operations that a "better followup system is needed" to "deal with recommendations by study Commissions."[167] Its report repeated the following recommendations of two years earlier:

> Our review showed that greater benefits could be obtained from the work of special study commissions—which the Government often uses to get advice on national problem areas or issues—if an effective system were established to promptly and fully follow up the commissions' reports and recommendations.
>
> We recommend that OMB provide the necessary leadership in the executive branch to establish effective followup systems on study commission recommendations.
>
> OMB concurs with this report's purpose and goal and the need for increased efforts by all branches and levels of government to consider study commission recommendations.

Because of the high cost of presidential fact-finding committees, such as the Violence Commission, and the paucity of tangible results from their reports, members of Congress developed a questioning attitude toward the creation and continuance of advisory committees generally. Amidst the criticisms of the numbers, the inefficiency, the secrecy and improper influences connected with advisory committees, the sponsors of remedial legislation have frequently inserted caveats, like Senator Metcalf's emphasis in introducing the FACA bill, that "many of the numerous advisory committees, boards, commissions and similar groups have provided a useful and beneficial means of furnishing expert advice, ideas and diverse opinions."[168] Repetition of that conviction has helped to prevent throwing out the baby with the bath.

EVALUATION OF PROPOSALS AND APPLICATIONS

Advisory committees have long been extensively used in the process of evaluating applications by individuals and private organizations for grants of government funds for scientific, scholarly and professional projects. Generally the funds being sought were specifically authorized and appropriated by Congress to permit the research or professional activity to be accomplished in the private sector rather than within agencies of the government. Sometimes the authorizing legislation contains specific directions for the evaluation of applications. An example is the Board of Foreign Scholarships, with the responsibility of "selecting students, scholars, teachers, trainees and other persons to participate in the programs authorized" under the Fulbright Act[169] and the later Mutual Educational and Cultural Exchange Act of 1961.[170] The board each year passes on several thousand applications for educational and scholarly exchange grants. In other cases the granting agency establishes one or more committees with the special responsibility of reviewing and making recommendations on—not selecting—applicants. Typical examples are the committees of the National Endowment for the Humanities, which reported 149 closed meetings of that kind of committee in 1978.[171]

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[167] U.S. General Accounting Office, Better Education Needed to Weed Out Useless Federal Advisory Committees, Washington, 1977.

[168] *Hearings on Presidential Advisory Committees, supra* note 135, at 117–20.

The standard system of evaluation of grant applications, exemplified by those described above, is "peer review." Sometimes the document involved, such as an application for funding or a manuscript seeking publication, will be sent to a few selected individuals, with qualifications in the field, for separate "peer" evaluation. When the "peers" are brought together by a government agency for collegial consideration, they become an "advisory committee." Almost universally, that kind of advisory committee has operated behind closed doors, and their deliberations have been withheld from public scrutiny. The Board of Foreign Scholarships, because it "selects" rather than recommends grantees, has been treated as an "operational" committee and for that reason exempt from the open meeting requirements of the FACA. The Humanities Endowment's committees and numerous committees established in the National Institutes of Health, however, are recognized as covered by the Act. Their meetings are all closed under the authority, cited in the published announcements of the meetings, of the statutory provisions permitting exclusion of the public where needed "to prevent a clearly unwarranted invasion of personal privacy" in both the FOIA, which applied under the original FACA, and the Sunshine Act, which now applies. A court decision has rejected a contention by a public interest group that documents involved in peer review are not protected by the FOIA exemption for matters of personal privacy.[172]

One peer review operation that has held open committee meetings is the Agency for International Development Research Advisory Committee. For example, the meeting on January 9, 1979, held in the Pan

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[169] 50 U.S.C. App. I, § 1641 (1970).

[170] 22 U.S.C. § 2451 *et seq.* (1976).

[171] SEVENTH ANNUAL REPORT, *supra* note 19, at 103.

[172] Washington Research Project, Inc. v. Dep't of Health, Educ. and Welfare, 366 F. Supp. 929 (D.D.C. 1973), *aff'd on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

American Health Organization building in Washington, considered applications by scientists at various institutions for new or renewed funding of research projects for agricultural improvement in several countries. One involved research at the University of Florida into "the potential of associative biological nitrogen fixation with the objective of significantly reducing the need for fertilizer nitrogen in grass crops." The discussion among the committee members, practically all experienced scientists, was lively, penetrating and learned. No one seemed inhibited in criticizing techniques and results because the meeting was open and the minutes would be available to all those involved in the proposed study. An adverse recommendation by a subcommittee was fully exposed. It was interesting that a vote on the same subject at a previous meeting was "nine in favor and eight abstentions."

The open meeting policy of the AID in considering scientific research applications does not necessarily indicate that other peer review groups could operate effectively in the open. The discussions of the relative qualifications of applications by individuals for scholarly activities tend to become very personal and subjective. There is no doubt that many of the members of committees evaluating that kind of application would feel seriously inhibited about candid expressions of opinions on applicants' scholarly capabilities and personal adaptability for projects if they knew that their statements were being heard by the applicants and their evaluations would be recorded in open minutes. The opinion of those who are asked to serve as "peer reviewers" is almost unanimous that their collegial deliberations and individual evaluations must be kept from public view. The Undersecretary of HEW, in a statement presented to the Senate Committee on Government Operations on March 10, 1976, expressed that department's conviction that an agency must have "the discretion to close a portion of a meeting" to preserve the "candor and confidentiality" that are essential to "the free exchange of views."[173] A characteristic discussion of the matter appears in the statement prepared by Professor Henry Steck for the hearings on FACA amendments in September, 1977:[174]

> As the Conference Report indicates, and as you will remember from last year's hearings, the subject of NIH peer review committees is an extremely complex one. NIH is rightly concerned with the integrity and quality of decisions made by its peer review structure and with the problem of premature disclosure of clinical trial data. . . . Similarly, the National Endowments for the Arts and for the Humanities have indicated that opening their review

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[173] *Hearings Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. 611, 627 (1976).

[174] Prof. H.J. Steck, Unpublished Statement on S. 1847, S. 2088, S. 1329 and S. 1838 to Amend FACA, State Univ. of New York at Cortland, Sept. 29, 1977.

> panel system under FACA would, as Ms. Nancy Hanks put it, "effectively destroy public participation in the Endowment's grant review process and would leave grant award decisions solely in the hands of Federal administrative personnel." I believe that a case for exemptions can be made out for review type panels or committees. Congress itself has recognized this principle in Section 110 of the National Cancer Act. As the Conferees on the Sunshine Act recognized, there are legitimate competing interests involved and it is not easy to balance, on the one hand, a respect for the privacy and work of an individual researcher and the need for a thorough assessment of a proposal by a jury of one's peers, and, on the other, a public interest that fiscal information and decisions regarding research priorities not be withheld from the public. As I suggested last year, "perhaps our attention ought to be properly addressed to finding a way to balance the public's right to know, the public's right to accountability, and the imperatives of an effective grant review system." Accordingly, it may be that statutory exemptions ought to be built into FACA itself in this and other cases where Sunshine Act exemptions seem to produce difficulties. Rather than struggling with construction of 9(B) and its availability or non-availability in a category of cases, it might be better for this Committee to draft an exemption designed to balance the competing interests with respect to peer review or other review systems. In doing so one would need to define the areas of disclosure, the extent of non-disclosure, and the mechanisms that assure adequate accountability. In short, where non-disclosure is permitted by closing a meeting there should be effective safeguards built in. The best approach, I would think, would be through building a statutory exemption into FACA itself. Such an exemption could then either supplement or replace 9(B).

Professor Steck included in his statement a quotation from a report of a Congressional Conference Committee, indicating their qualified acceptance of the principle that peer review deliberations may be closed:

> The conferees, however, are concerned about the possible effect of this amendment upon the peer review and clinical trial preliminary data review system of the National Institutes of Health. The conferees thus wish to state as clearly as possible that personal data, such as individual medical information, is especially sensitive and should be given appropriate protection to prevent clearly unwarranted invasions of individual privacy. While the conferees are sympathetic to the concerns expressed by NIH regarding its committees, funding recommendations and analysis of preliminary data, the conferees are equally sympathetic to concerns expressed by citizens' groups that important fiscal and health-related information not be unnecessarily withheld from the public.

If peer review meetings and minutes are closed, the applicants and representatives of groups interested in the proper administration of grant programs may have no means of knowing why an application was rejected or whether it was given due and fair consideration. Some agencies make a practice of revealing reasons to rejected applicants, without naming the reviewers on whom reliance was placed.[175] Requiring agencies to open their peer review proceedings to that extent may be the best middle ground between open meetings and tight secrecy. The National Endowment for the Humanities has regularly divided the meetings of its council into open and closed sessions. A comparable division could be applied in the case of peer review activities, with a limited opening of documents to the scrutiny of applicants, revealing reviewers' reasons for recommendations, but without names of reviewers. The Board of Foreign Scholarships could similarly open its "advisory" sessions, while keeping the review of applications closed.

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[175] *Id.* at 22.

Regulations issued under the authority of section 7 of the FACA could presumably effect these results.

PERSONNEL SELECTION

The Committee for the Selection of Federal Judicial Officers, the President's Commission on White House Fellowships, the Presidential Advisory Board on Ambassadorial Appointments, and the United States Circuit Judge Nominating Commission, are examples of committees giving advice on personnel selection. Their purpose almost always calls for closed meetings for the same reasons as the peer review committees: they deal with matters of personal privacy, and all members of the committees are likely to feel that candor and depth of inquiry will suffer if they must speak and deliberate in public. A balancing of interests between the need for thorough consideration of nominees and the restraining effects of publicity probably comes out in favor of closed meetings. For this kind of meeting, the literature and testimony do not seem to contain arguments to the contrary.

The names of the members of these committees are listed in the Index prepared for several years by the Senate Committee on Government Operations. This gives an opportunity to complain if anyone feels that a proper "balance" has not been maintained in making selections. The list of members in the December 1978 edition of the Index does not reveal any obvious instances of imbalance. It does reveal many names of great prestige and suitability, and due regard for ethnic and geographical distribution. The names of W. Averell Harriman, William Scranton and John Hope Franklin, for example, are listed under the Advisory Board on Ambassadorial Appointments. Erwin N. Griswold, Joseph D. Tydings and Coleman Young are among those listed under the Circuit Judge Nominating Committee.

ADMINISTRATIVE INTERPRETATION

Interpretations of the FACA, and particularly the portions defining its scope, have been made repeatedly, both formally and informally, by administrators and their legal advisers. The most conspicuous example is the published draft of a revision of Circular A–63, which appeared early in 1973, about three months after the Act was passed.[176] It reflected the opinions of officers of the Office of Management and Budget and the Department of Justice on the way the Act should be implemented. Significant passages are quoted under the heading, "Unstructured Ad Hoc Groups," in this report. When the final versions of the 1973–1974 revision of Circular A–63 was promulgated, however, most of the interpretive provisions had disappeared, replaced by simple repetition of the words of the Act.[177]

The Act gave the OMB, through the "Committee Management Secretariat," the responsibility "for all matters relating to advisory committees" and for prescribing "administrative guidelines . . . applicable to advisory committees."[178] The Department of Justice has the overall responsibility of providing legal advice to other departments and agencies. Under Reorganization Plan No. 1 of 1977,[179] the Committee Management Secretariat was transferred to the General Services Administration, so that the administrative responsibilities given to OMB under section 7 of the Act are now lodged in GSA. Consequently, the responsibility for administrative interpretation presumably now resides in GSA, with the counsel of the Department of Justice.

There have been numerous interpretations of the FACA based on consultations among the Department of Justice, the Committee Management Secretariat and various inquiring agencies. Varying consequences have resulted from those consultations. Naturally, many times the Justice Department's opinion has been accepted and implemented by the affected agencies. If the question presented has arisen from an agency's unwillingness to accept an interpretation from a private source, and the Justice Department agreed with the latter, the Justice Department has a means of enforcing its view. It can advise the agency that, if a court action is started, the agency's position will not be defended by the government. The agency would risk a judgment for attorney's fees if it failed to accede to the claimant's demand.

When a conflict of interpretation arises between an agency and the secretariat, a different situation exists. An interesting example arose in 1977 while the secretariat was still in OMB, in connection with the "Contingent Employee Liability Insurance Panel." That group had been established as a "panel" of the "Advisory Committee of the Pension Benefit Guaranty Corporation," which in turn had been created by section 4002(h) of the Employee Retirement Income Security Act of 1974.[180] Paragraph (8) of subsection 4002(h) expressly states that the FACA "does not apply to the Advisory Committee established" by subsection (h). The officer in charge of the Secretariat in OMB noticed that the Pension Benefit Guaranty Corporation had not filed a charter for the panel and followed other procedures applicable to advisory committees. The secretariat, consequently, inquired as to the reason for the failure to conform to the Act. The corporation, through its general counsel, replied that the panel was "no more than a creation of the Advisory Committee," established to advise the committee only, and did not give advice to the corporation. Accordingly, it was argued, the panel was not "established or utilized" by an "agency," but only by the exempt committee.[181] The difference of interpretation has not been resolved, and the result is that, like all other advisory committees exempted from the Act, the panel and the committee have not been listed in the annual reports among the advisory committees in existence each year, and no material of either group is on file at the secretariat.

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[176] 38 Fed. Reg. 2306 (1973).

[177] THIRD ANNUAL REPORT, *supra* note 18, at 123.

[178] FACA, *supra* note 7, § 7.

[179] *See* note 77, *supra*.

THE PROBLEMS PERCEIVED

The legislative history of the FACA in hearings, reports and debates is ample, and is supplemented by court decisions and scholarly writings on the subject of advisory committees. When members of Congress have looked at the subject, they have seen a vast and fluctuating number of committees and people influencing governmental operations and activities without much direction or control. In February 1971, when Representative John Monagan of Connecticut, who chaired the Special Studies Subcommittee of the House Committee on Government Operations, introduced H.R. 4383, he referred to the "lack of organization within this fifth branch of government" and the need for "restructuring the Federal Committee system."[182]

On the other hand, the critics of the system among the public interest groups and consumer advocates were complaining chiefly about secrecy and lack of "balance" in the membership of committees, giving special industry interests undue influence. They saw representatives of big business meeting regularly behind closed doors and turning out reports and recommendations that were influencing government action against the interest of consumers, small business and other outsiders.

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[180] 29 U.S.C. § 1302(b) (1976).

[181] Exchange of Correspondence Between Henry Rose, General Counsel of Pension Benefit Guaranty Corporation, and William Bonsteel, Committee Management Secretariat, OMB, On February 10, 1977, April 1, 1977 and Sept. 13, 1977.

[182] SOURCE BOOK, *supra* note 1, at 259.

All of those concerns have continued to be expressed even after the enactment of the FACA. This study is an attempt to evaluate the validity of the persisting complaints about the creation and use of advisory committees and to propose measures that will remove as many of the faults as possible while enabling the government to continue to reap the benefits of the system.

AMENDING THE FACA

Only one amendment to the FACA has passed Congress since the enactment in 1972.[183] Several other proposed amendments, usually tightening regulations, have been the subject of hearings before congressional committees.[184] Almost every proposal has been uniformly opposed by departments and agencies of the executive branch. Amendments pending in 1979, however, have more of an administrative focus, and do not raise the same kind of issue.

The single amendment that has been adopted changed the list of exemptions originally incorporated in section 10(d) by reference to the FOIA to a reference to the Sunshine Act.[185]

In March 1976, the Senate Subcommittee on Reports, Accounting, and Management of the Committee on Government Operations held extensive hearings on two proposed amendments: S. 2947, introduced by Senator Metcalf, chairman of the subcommittee, and S. 3013, introduced by Senator Percy, a member of the subcommittee.[186] The Metcalf bill was aimed at the various alleged loopholes of the FACA, all of which were fully aired during the hearings. For example, the charge had been made that "ad hoc" groups were being formed for single meetings deemed outside the Act. Therefore, the definition section was to be amended by expressly including "any ad hoc groups" in the definition. Similarly, it was reported that committees with "operational" duties were being considered outside the Act because not purely "advisory." Consequently, the definition was to be amended to include groups with "operational" responsibilities "other than providing advice and information." In other sections, committees in some specific agencies were added and some were excluded.

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[183] 5 U.S.C. App. I, § 10(d). (1976).

[184] *See* note 51, *supra.*

[185] Pub. L. No. 94–409, Sec. 5(c) (1976).

[186] *Hearings Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Gov't Operations*, 94th Cong., 2d Sess. (1976).

The second target of the bill was the alleged lack of balance in advisory committee membership. The amendments would have required that members be "publicly solicited" and that one-third be "drawn from citizens in private life who shall represent the interests of the public . . ." These changes were strongly advocated by witnesses who cited such horrible examples as the National Industrial Pollution Control Council, which had industry members only and held closed meetings. After the FACA was enacted it "withered away."[187]

Another part of the bill would have required reports to Congress on progress made in carrying out "accepted recommendations" of presidential advisory committees. This amendment must have been motivated by the repeated charge that presidential commissions appear and reappear "like comets," at great expense, without leaving much effective results behind.

For several years, the only list of members of all federal advisory committees has been the Index prepared for the Senate Committee on Government Operations. One of the amendments proposed in S. 2947 would have made the president responsible for maintaining such a list and having it published in the annual reports required by section 6(c) of the Act. The Index contains over 50,000 entries on over 1000 pages; it would use a lot of appropriated funds.

Other provisions of the proposed amendment filled in gaps in the existing requirements of the Act. One of the most upsetting to agencies was a suggested requirement of "a complete audio or audio and visual recording" of every closed advisory committee meeting, to be deposited at the Library of Congress no more than twenty-four hours after the completion of the meeting, obviously too short a time for a typescript to be made, although the bill called for such a typescript if any committee member requested it.

A final portion of S. 2947 contained elaborate provisions for making and reporting agency determinations to close meetings, with a detailed grant of jurisdiction to U.S. district courts to hear complaints in camera about plans to hold closed meetings.

The chief aim of S. 3013 was to require public reporting of "any nonappropriated funds or any thing of value for the support, operation, or maintenance of any advisory committee and the source" of any such funds or things of value.[188] It also would have required reports showing committee recommendations and "the length of time each committee recommendation was pending or not acted upon."[189]

Neither of these bills made significant progress toward enactment.

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[187] *Id.* at 117.

[188] *Id.* at 19.

[189] *Id.* at 19–20.

In the first session of the 96th Congress, two bills were introduced containing provisions affecting the FACA as part of a general overhaul of regulatory and rulemaking procedures. Both were referred jointly to the Committees on the Judiciary and Governmental Affairs, the latter having legislative jurisdiction in the advisory committee area.

S. 262 was introduced by Senator Kennedy and several other senators, including members of the subcommittee concerned with the FACA. Its only reference to FACA is a requirement that the Administrative Conference, under its new charter, issue "advisory guidelines, and otherwise provide guidance and assistance to any agency" which is subject to the Federal Advisory Committee Act. This kind of function, it may be noted, is already being carried on, to a certain extent, by the Administrative Conference, which has caused to be published "An Interpretive Guide to the Government in the Sunshine Act," giving help and advice to all agencies covered by that Act.

S. 1291, also introduced by Senator Kennedy, contains two references to the FACA. The first authorizes any agency proposing rulemaking to "create an ad hoc advisory committee which is not subject to any requirements of the Federal Advisory Committee Act except the requirements in section 10(a) and (b)," which call for open meetings and for minutes and other documents to be available to the public. Thus, they would be exempted from the requirement of filing a charter, and some other administrative details.

The second reference to the FACA in S. 1291 adds a clause to subsection 7(a) to remove from the Committee Management Secretariat all responsibility "for committees established or utilized by one or more agencies." This appears to be a misprint, because, if committees established by "one or more agencies" are removed, what is left? Perhaps "two or more agencies" was intended, but why? Other provisions of the bill would make minor changes in administrative details of the act.

CONCLUSIONS

1. Advisory committees are an important arm of the government. They provide a means of providing expert, technical and scholarly advice from experienced and representative individuals who are not regularly available as officers and employees of the government. The only alternative means of obtaining advice and information on the scale now covered by advisory committees would involve the recruitment of thousands of consultants at maximum rates of compensation. The cost would far exceed the current expenditures for travel and per diem of all the members of the advisory committees.

2. The overwhelming majority of "advisory committees" are operating strictly in accordance with the FACA. The regulations of the Act are not interfering with the efficiency and effectiveness of the vast majority of committees subject to the Act. In a few instances, the restrictions and prescriptions are unduly restrictive, but amendment of the Act is not necessary or desirable.

3. (a) The scope of the Act, measured by the statutory definition of "advisory committee" and administrative interpretations, (i) leaves out numerous committees that, in the view of critics, should be included, (ii) embraces several kinds of activities that other critics believe should be exempted from the provisions of the Act, or at least certain parts of the Act, and (iii) creates doubt as to the intent of Congress to include or exempt various kinds of groups operating near, with, or for government agencies. The scope should be clarified, preferably by administrative interpretations that carry out the intent of Congress.

The most important clarification involves groups of private citizens or organizations not formed by action of any government agency or not formally structured and not convened more than once, even if their activities result in advice, reports and recommendations that are considered and used by government officials and agencies. The line between the kind of "committee" that should be covered by the Act and that Congress intended to embrace within the Act, and those groups that are not and need not be covered by the Act, or by all its provisions, is blurred and uncertain. Even if no definition can clarify every situation, the bulk of the doubt could and should be removed by a clearer statement of scope.

(b) In redefining the scope of the Act, there should be a clear resolution of the question of the place of committees that are not exclusively "advisory." The present practice, which follows the original draft (1973) of the OMB-Justice Department guidance circular,[190] is to consider as outside the scope of the Act any group that exercises any "operational" function, even though it resembles an "advisory" committee in every other way. That interpretation stems in part from the words in the "Findings and Purposes" in section 2(a)(6) of the Act, that "the function of advisory committees should be advisory only . . . ."[191] A satisfactory solution might be to exempt the "operational" activities from those parts of the Act that are inappropriate for that kind of function, but apply it fully to the strictly "advisory functions." On the other hand, operational committees are so much like government agencies that perhaps the principles of the Sunshine Act should be applicable. Why not expressly have the FACA apply? Any of the activities of this kind of committee that call for confidentiality, such as deciding matters involving personal privacy, can be closed to the public under the same exemptions as apply to advisory committees and collegial agencies pursuant to section 552b(c) of the Sunshine Act.

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[190] 38 Fed. Reg. 2307 (1973).

[191] FACA, *supra* note 7, § 2(a)(6).

(c) The files of the Committee Management Secretariat and the annual reports on advisory committees do not contain records or information about committees that are not deemed to be covered by the FACA. This includes committees expressly exempted from the Act by statutory enactment and those not "established or utilized" by a government agency, although they operate and deal with the government in many respects just as the covered committees do. The FACA does not require conformity with the Act of any group other than an "advisory committee" as defined in the Act. Similarly, Circular A–63 does not reach beyond the defined groups, although it does call for due filing of a charter of "each advisory committee" including "committees 'utilized' as advisory committees, though not established for that purpose." That still leaves out groups outside the statutory definition.

The absence of a centralized record of groups that influence government action by means of reports, interviews or other forms of "advice," but are not under the Act, means that some of the aims of the FACA are being frustrated. Paragraph (5) of the Act's "Findings and Purposes" states that "the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees."[192] A method of informing the public whenever a government agency receives and considers "advice" from an exempted group would further that purpose and would eliminate much of the risk that powerful, well-financed groups will exercise influence without having their activities revealed to interested and affected parts of the public. If that kind of "advice" is deemed worthy of attention and consideration, a notice of its receipt, with a description of the group submitting the material, could be published in the *Federal Register*. It must be noted, however, that

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[192] *Id.* § 5.

"advice" received from individuals and organizations that would not be under the FACA anyway, because not a "committee," is probably not significantly different from advice from groups that can be called "committees." Many individuals and organizations have as much influence as committees, although groups are likely to represent a wider constituency. In both cases, the agencies should be sensitive to the importance of affording an opportunity to respond and comment for groups and interests with different or opposing points of view. The agencies should adopt methods of alerting the latter to the receipt of reports or other forms of advice that are receiving consideration, and of providing means for them to submit timely responses.

Another example of reconciling the aims of the Act with the need for some flexibility is the "one-shot" group. The problem posed by the inadequacy of the Act's definition of "advisory committee" has been demonstrated by the effort throughout the government to simplify and shorten administrative regulations. An agency task force that has drafted a new set of regulations, but is not ready for the preliminary publication for comment, has often sought reactions from various private individuals and organizations with experience in the subject. For that purpose, small groups of people have been invited to convene with the government drafting groups to go over the proposed revision. After consideration of the group's comments, the revision is made ready for the standard public notice of the proposed regulation. If these groups are covered by the FACA, the spontaneity and flexibility of the process is lost. The need for a "charter," for advance notice of the meeting, and for demonstrable "balance" among those invited would make this kind of meeting impractical. In practice, agencies have assumed that these unstructured, one-time, ad hoc groups are not under the Act, and Judge Gesell's opinion in the *Nader* case supports that conclusion.[193]

4. The circumstances that warrant the closing of meetings from public attendance need reexamination and some clarification. Some abuses of the privilege of holding closed meetings have been alleged; whether the charges have been substantiated is uncertain. In any event, additional administrative guidelines, drafted in the spirit of the FACA, would remove some of the uncertainty as to the justification for declaring meetings closed. If proposed guidelines are adopted after public announcement and hearings, future administration of the system would be more harmonious.

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[193] *See* note 116, *supra.*

5. A similar need for clarification arises out of the requirement of subsections (b) and (c) of section 5 of the Act that the president, agency heads and other federal officials shall be guided, in creating advisory committees, by the principle that the membership will be "fairly balanced in terms of points of view represented and the functions to be performed" by the committee. Doubt has existed, for example, whether this means that various political, ethnic, geographic, educational, and societal points of view are to be represented, or that the members should have a balance of relevant training, experience and professional competence. The legislative history contains volumes of evidence as to how particular members of Congress and committee witnesses felt on this subject. No solution is likely to set all the criticisms at rest, but there could be something more precise than the simple admonition of "balanced membership" that appears in paragraph 10 of Circular No. A–63.[194] One means of achieving the desired balance of membership, for example, would be timely publication of a notice of the intention to appoint an advisory committee, with a request for applications and suggestions of names. Such a system would have the added advantage of providing agencies with lists of qualified and interested candidates for membership.

6. The only present recourse for members of the public who are excluded from a closed committee meeting, or who feel unrepresented because membership is "unbalanced," is to apply to a court for some kind of injunctive relief. No government office now considers that clear responsibility for enforcing the requirements of the Act has been delegated to it. The Act, in section 7(c), expressly gives the director of the Office of Management and Budget the responsibility of prescribing "administrative guidelines and management controls applicable to advisory committees." This seems to give power to the director to issue guidelines such as those in Circular A–63 and as are needed to clarify other responsibilities under the Act. Executive Order 12024 of December 1, 1977, transferred to the administrator of General Services "all the functions vested in the President" by the Act and brought into effect Reorganization Plan No. 1 of 1977, transferring the responsibility of OMB for prescribing guidelines.[195]

Issuing guidelines and enforcing them do not necessarily belong in the same agency. A measure of executive enforcement of the provisions of the Freedom of Information Act and the Privacy Act has been lodged, by order of the Attorney General, in the Office of Information Law and Policy in the Office of the Associate Attorney General in the

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[194] THIRD ANNUAL REPORT, *supra* note 18, at 130.

[195] *See* note 42, *supra*.

Department of Justice. The order calls for the director of the Office to "coordinate" requests for FOIA releases of information; to advise executive agencies on questions relating to interpretation and application of the FOIA; and to "coordinate the development and implementation of and compliance with" the policy of the FOIA and Privacy Act. Denials of requests for records under the FOIA are to be subject to consultation through the office "before litigation ensues." After the start of litigation, responsibility shifts within the Department of Justice to the Civil Division.

Adding the FACA to the other two Acts in the Department of Justice's order, should provide a satisfactory means of administrative review of disputes among an agency, the GSA or a member of the public. The ultimate sanction in each case, when the agency and Office of Information Law and Policy disagree, would rest with department's method of deciding whether it will defend the agency's position if it comes before a court.

7. A systematic review of the recommendations of committees, particularly the major presidential fact-finding and policy-advising commissions, is needed. This was a major concern expressed by Lloyd Cutler when he noted the desuetude that often follows a report by a prestigious committee, such as the Eisenhower Commission on the Causes and Prevention of Violence.[196] Similarly, the General Accounting Office, in its 1977 report, recommended an OMB follow-up system to see that the effort of these commissions is not wasted. OMB is obviously a logical agency to exercise that responsibility. Indeed, the FACA expressly creates a Committee Management Secretariat within OMB to be "responsible for all matters relating to advisory committees." All the FACA responsibilities of the Committee Management Secretariat have been transferred by executive action to the General Services Administration, although the OMB budget examiners still evaluate the need to continue advisory committees as a regular part of their annual review of every departmental and agency budget. Perhaps the Secretariat, wherever it is located, can add a follow-up responsibility to its other functions under the Act. If this occurred, a substantial increase in its staff would be required.

RECOMMENDATIONS

Amend or supplement Circular No. A–63 as follows:

(a) Change subparagraph b of paragraph 4, the definition of "advisory committee," to read as follows:

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[196] *Hearings on Presidential Advisory Committees, supra* note 135, at 117.

b. "Advisory Committee" means, consistent with section 3 of the act:

(1) any committee, board, commission, council, conference, panel, task force or other similar group, or any subcommittee or other subgroup thereof which is:

(A) established by statute or reorganization plan, or
(B) established or utilized by the president, or
(C) established or utilized by one or more agencies in the interest of obtaining advice or recommendations for the president or one or more agencies or officers of the federal government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the federal government.

(2) A committee is "established" by statute or reorganization plan when the statute or plan expressly states that the particular advisory committee is or shall be created. A statute or plan that only authorizes the creation of a committee does not "establish" it.

(3) The words "established or utilized" in the definition of "advisory committee" do not apply to a committee or other group unless it is (i) created by action of the president or of an agency, and (ii) has members appointed to convene, formulate advice, provide information or report to the president or an agency for more than a single session. The definition, however, includes committees and other groups that exercise some operational as well as advisory functions.

(b) Change paragraph 5 of Circular No. A–63 by adding a new subparagraph c as follows:

c. Whenever a difference of opinion arises between an agency or an advisory committee and a person outside the government concerning the applicability or interpretation of any portion of the Act, the question, if not resolved to mutual satisfaction between the parties, shall be referred to and considered by the Office of Information Law and Policy of the Department of Justice. The decision of that office shall constitute the position of the government, binding on the agency or advisory committee, in any litigation of the question that may ensue.

(c) Add a new paragraph in section 10 of Circular A–63 stating that the "Comprehensive Review" required by that section shall include a review and report of actions taken by appropriate agencies to implement recommendations of advisory committees whose work has terminated with a report containing proposals for future governmental action.

Appendix

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION 80–3

Interpretation and Implementation of the Federal Advisory Committee Act

The Federal Advisory Committee Act was enacted in 1972 in response to a wide range of criticisms concerning the activities and influence of advisory committees operating within and alongside government agencies. The need for the large number of committees in existence was questioned, and there were complaints over lack of adequate public information concerning their purposes, their membership, the course of their deliberations, and the extent of their influence. In addition, fears were expressed that committees were often inadequately balanced to reflect the spectrum of interests affected by their recommendations. Finally, the government seemed frequently to fail to implement, or even to respond to, important recommendations offered by prestigious committees after protracted and expensive research, hearings and study.

It cannot be expected that FACA in operation would have wholly silenced the criticisms which led to its enactment. Yet, the conference's study does indicate certain positive results from FACA, including more careful evaluation by government of the need for establishing or continuing advisory committees, more attention paid to their makeup and responsibilities, and more openness in their deliberations. We are not prepared to recommend at this time any major revision of the statute, either to embrace more activities by committees and similar groups, or to reduce the coverage and requirements of the Act. However, there are areas where clarification and perhaps some narrowing of coverage would ease problems of administration and remove artificial barriers to communication between the agencies and the interested public. In addition, a more vigorously coordinated implementation of FACA by the executive branch would provide more guidance to the agencies and the public and a more consistent application of FACA within government and in the courts.

1. The Federal Advisory Committee Act directs the Office of Management and Budget to "prescribe administrative guidelines and management controls applicable to advisory committees." This authority has since been transferred to the General Services Administration by Reorganization Plan No. 1 of 1977, and Executive Order 12024. Neither OMB nor GSA has made adequate use of

this statutory authority to assist the agencies in resolving difficult questions involving the coverage of the Act, particularly the applicability of the Act to ad hoc and informally established advisory groups. As a result, courts have been faced with the need to resolve such issues without the assistance of authoritative administrative guidelines. Accordingly, GSA, in consultation with OMB and the Department of Justice, should undertake a revision of the guidelines at present contained in OMB Circular A–63, so as to provide greater assistance to the agencies, and, in particular, to deal with the problems of classification of committees experienced under the Act (see paragraph 2, below). The proposed guidelines should be made available to agencies and the general public for comment before they are finally issued, and upon issuance the guidelines should be widely published. Where a legal dispute concerning the applicability of the Act to particular advisory bodies cannot be resolved between the agency and GSA, the dispute may be submitted to the Department of Justice for resolution pursuant to Part 1–4 of Executive Order 12146.

2. The most serious problems regarding the coverage of FACA have involved the applicability of the Act (a) to groups convened by agencies, on an ad hoc basis, without formal organization or structure or continuing existence, to obtain views on particular matters of immediate concern to the agency, and (b) to privately established groups whose advice is "utilized" by an agency.

a. Uncertainty as to the applicability of FACA to one-time or occasional meetings between ad hoc groups and government officials has tended to discourage useful contacts with the private sector. It is impractical to require such meetings to conform with the Act's requirements regarding chartering, advance notice, and structure of the committee. The Administrative Conference believes that the Act is not applicable to ad hoc, unstructured, noncontinuing groups and that GSA's guidelines should make this clear. Coverage of such groups would not further the purposes of the Act.

b. The conference believes that the definition of "advisory committee" is limited to committees either established by government action or affirmatively supported and "utilized" by the government through institutional arrangements which amount to the adoption of the group as a preferred source of advice. GSA's guidelines should make this clear.

c. Agencies should be sensitive to the desirability of making available to the public advice or information obtained from private or ad hoc groups not covered by FACA when the agency is considering action based on such advice or information.

3. Advisory committees frequently are useful in furnishing expert technical and scholarly advice to the government, often at little or modest cost, and in providing a valuable channel of communication between the government and the private sector. FACA has been successful in bringing about the elimination of many unnecessary advisory committees. It continues to serve a constructive purpose in requiring agencies and GSA periodically to evaluate the usefulness of each advisory committee, but such a review should be objective and should not be premised on any assumption that fewer advisory committees is a desirable goal in and of itself.

SEPARATE STATEMENT OF ALEXIS C. JACKSON

Government Member, Administrative Conference of the United States

The consideration and study of the Federal Advisory Committee Act by the Administrative Conference has been a valuable and necessary exercise. However, I do have some reservations and additional comments to make regarding Recommendation 80–3, ¶¶ 2(a–c).

Recommendation 80–3, ¶ 2(a) causes substantial concern. We in the Department of the Interior have consistently interpreted the Advisory Committee Act to include so-called ad hoc committees. We have based this interpretation on the clear statutory language of section 3 of the Act together with the spirit of openness in government embodied in the Act. We believe our interpretation to be well-founded. When the courts have been presented with the question of the applicability of FACA to ad hoc committees they have, with only one exception, ruled that the committees are *not* exempt from the Act. In the one case where an ad hoc committee was held to be outside the Act, *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975), the decision reflected the possible constitutional consequences of restricting meetings within the office of the president, together with the very loose nature of those meetings.

The recommendation to exclude ad hoc committees administratively is fraught with problems. If our interpretation is correct, the General Services Administration (GSA) would be powerless to amend the statute by its own interpretation. Any such attempted interpretation would lead only to confusion and ultimately to litigation by members of the public who have been excluded from viewing or participating in such meetings. It is likely that such litigation would be directed at the agencies that utilize such committees—not GSA.

Moreover, even if authorized, the recommendation invites abuse. Agencies seeking to circumvent the requirements of the Act would merely characterize committees as ad hoc. If an additional meeting or meetings are required, the agency could simply call another excepted ad hoc meeting. In the interest of a free and open democratic government, the chartering of all advisory committees should not be viewed as an overwhelming burden, even those which last for only several hours. The burden is in the artificial barriers imposed by GSA in the consultation process.

Similarly, I feel constrained to take issue with Recommendation 80–3, ¶ 2(b). The case of *Lombardo v. Handler*, 397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir., 1976), *cert. denied*, 431 U.S. 932 (1977), suggests a far more liberal interpretation of the term "utilize" than contemplated by the Recommendation. So does *Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978). These cases foreclose the suggestion contained in the recommendation, ¶ 2(b). I believe GSA could assist agencies by more clearly defining "utilize" in its guidelines.

Recommendation 80–3, ¶ 2(c) underscores the need for careful consideration of the issues presented in the matter of FACA's interpretation. Paragraph 2(c) contains the mere precatory suggestion that agencies should be "sensitive" to the need for making advice received from ad hoc committees available to the public when considering action based on such advice. This might be read as a retreat from previous conference expressions, see Recommendation 77–3, regarding making publicly available the substance of communications from outside the agency in pending rule-making proceedings.

To conclude, I am not troubled by the interpretation the courts have given FACA. I do believe, however, that the chartering of committees should be facilitated by GSA rather than hindered by it. The consultation process originally contemplated was designed to be just that—consultation—and not one of final determination of whether a committee ought to be established. That determination is reserved to the agency head. If this original concept were to be reborn, agencies could more effectively and supportively comply with the Act.

As I read them, Recommendation 80–3, ¶¶ 2(a) and 2(b) seek to change the coverage and scope of the Act. This, of course, contradicts the preamble of Recommendation 80–3 which states "We are not prepared to recommend . . . any major revision to the statute. . . ." In view of the stated intention, we believe the conference should reconsider Recommendation 80–3, ¶¶ 2(a–c) and adopt a revised recommendation (attached) in accordance with the views outlined in this statement.

If on the other hand, the conference does not revise Recommendation 80–3 ¶¶ 2(a–c), the substance of its proposal should be submitted for legislative action.

ATTACHMENT TO SEPARATE STATEMENT OF ALEXIS C. JACKSON

Suggested Revision of Recommendation 80–3, Paragraphs 2(a–c)

2(a) Ad hoc groups which meet with government officials on a one-time or occasional basis are advisory committees under FACA. It is therefore necessary for such meetings to conform with the Act's requirements regarding chartering, advance notice, and structure of the committee. The Administrative Conference believes that conformance to the Act will be facilitated by GSA adhering to a consultant's role as contemplated in section 9(a)(2) of the Act rather than a role of determining whether a committee should be established.

2(b) The conference believes that the definition of "advisory committee" includes committees either established by government action or supported and "utilized" by the government through consideration by the government of the committee's advice. GSA's guidelines should make clear the application of the term "utilize."

2(c) Advice or information obtained from private or ad hoc groups in an ex parte manner is not sanctioned. To the extent that agencies do receive such advice or information, the Administrative Conference believes that agencies should make such advice available to the public, particularly when the agency is contemplating action (such as rule making) which may be based on or use such advice or information.

REPORT IN SUPPORT OF RECOMMENDATION 80-4

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Disqualifications of Decisional Officials in Rulemaking

Peter L. Strauss*

What constraints on impartiality govern agency officials responsible for decisions in proceedings other than on-the-record adjudications? The past few years have witnessed the emergence of a striking body of professional debate, statute, and case law concerning ethics in government and the control of "special interest" influence on governmental decisions. Higher standards for conflict of interest, expanded constraints on ex parte communications, and enlarged concerns about separation of functions within the agencies are parts of this development. Another strand, tangled with the others yet doctrinally distinct, concerns the disqualification of responsible government officials for their prior contacts with or expressions of opinion on issues to be brought before them for decision. In the familiar setting of on-the-record adjudication, near-judicial impartiality is a conceded requisite. Today, arguments for disqualification are being pressed with vigor, and responded to, well beyond this setting. This paper is addressed to these developments.

I. The Disqualification Problem

Several recent cases illustrate the emerging controversies. The best known is *Association of National Advertisers v. Federal Trade Commission* (*ANA*),[1] which arose in the course of rulemaking proposing constraints on television advertising directed at children. The rulemaking was to be conducted under the specialized rulemaking procedure of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.[2] Ordinarily, agency rulemaking requires only published notice of a proposal, an opportunity for written public response, and subsequent publication of the rule together with a "concise general" explanation. Under the FTC procedures, however, disputed issues of material fact, once identified, are to be determined on the record using procedures including so much cross-examination as is appropriate and required for a full and true disclosure.[3] Before the rulemaking had begun, but in apparent response to a petition for rulemaking filed by two "public interest" groups, Michael Pertschuk, the Commission's Chairman, made a number of statements reasonably taken as indicating strong views on the need and justification for regulating television advertising aimed at children.[4] Later, the Commission's staff published an extensive Staff Report on Televised Advertising to Children,[5] and the Commission announced the formal initiation of a rulemaking proceeding. It sought comment on remedial measures its staff had proposed and solicited further suggestions from other sources, identifying sixteen broad issues as particularly (but not exclusively) deserving of comment.[6] These issues included matters about which Chairman Pertschuk had previously expressed strong opinions—for example, whether children younger than a certain age would ordinarily understand the commercial purpose of advertising or whether the consumption of sugared products at or between mealtimes contributes to tooth decay. Shortly after the notice was published, and thus before "disputed issues of material fact," if any, could be identified,[7] the Association of National Advertisers sought Chairman Pertschuk's disqualification from further participation in the proceeding because he had allegedly prejudged the matters to be determined. Replying that he held only "tentative views on policy issues or legislative facts," the Chairman declined to remove himself from the proceeding. He was upheld in this by the Commission[8] and, after a reversal in district court,[9] by a divided panel in the Court of Appeals for the District of Columbia Circuit.[10]

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This Article is based on a report submitted to the Administrative Conference of the United States in the spring of 1980. The study was provoked by a district court opinion, Association of Nat'l Advertisers v. FTC, 460 F. Supp. 996 (D.D.C. 1978), which on appeal became the occasion for one of the very last of Judge Leventhal's opinions, issued posthumously. Association of Nat'l Advertisers v. FTC, No. 79-1117 (D.C. Cir. Dec. 27, 1979), cert. denied, 100 S. Ct. 3011 (1980). The opinion, a concurrence, was marked by characteristic insight and grace, and reflected the judge's profound capacity to understand and accommodate the legitimate claims both of government agencies and of those subject to their regulation. Those who labor in this field will always remain deeply in his debt.

The views expressed in this Article are solely those of the author. They reflect his consultations with persons in and out of government, and have been much aided by the Conference's processes, but the responsibility for them nonetheless remains with him. Richard Andersen, Jeff Shapiro, and Kay Sherman of the class of 1981 provided valuable research assistance.

Masculine pronouns are used throughout this Article, in conformity with *Review* style; they should be understood to refer to women as well as men.

[1] No. 79-1117 (D.C. Cir. Dec. 27, 1979), cert. denied, 100 S. Ct. 3011 (1980).

[2] 15 U.S.C. § 57a (1976).

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[3] These procedures have been the subject of recent intense study and a report, including recommendations, to Congress by the Administrative Conference. See ACUS Recommendation 79-1, 44 Fed. Reg. 38,817 (1979). The study did not reach disqualification issues. The Commission's efforts to regulate television advertising to children, although never yet brought near the point of effective action, have already been the subject of considerable dispute. E.g., Matter of ITT Continental Baking Co., 82 F.T.C. 1183 (1973); Association of Nat'l Advertisers v. FTC, 617 F.2d 611 (D.C. Cir. 1979). Legislative controls are also under active consideration.

[4] For example, he appeared before one of the groups that had submitted the rulemaking petition to discuss the legal theories and tactics by which controls over advertising to children could be achieved. He wrote the Administrator of the Food and Drug Administration of his "conviction . . . that one of the evils flowing from the unfairness of children's advertising is the resulting distortion of children's perceptions of nutritional values," and went on to explain the tactics of securing a readily defended rule to curb the "commercial exploitation of children," particularly with respect to the sale of sugared products.

[5] The Report was made public on Feb. 5, 1978, and discussed in a public meeting of the Commission on Feb. 28, 1978.

[6] 43 Fed. Reg. 17,967 (1978).

[7] In a separate part of its action, the Commission had set time limits for submission of written comments and provided for the holding of an informal, "legislative" hearing; at the conclusion of *that* hearing, the Commission indicated, it would decide whether "crucial issues" of disputed fact remained that required a form of on-the-record determination (possibly including cross-examination). See 43 Fed. Reg. 17,967 (1978). These procedural arrangements, on the whole consistent with the Administrative Conference's subsequent recommendations, note 3 supra, have been cast into some doubt by dicta in the majority opinion in Association of Nat'l Advertisers v. FTC, 617 F.2d 611 (D.C. Cir. 1979).

[8] TRR No. 215-60, July 18, 1978.

In a second case, Chairman Daniel O'Neal of the Interstate Commerce Commission was challenged by truckers anxious to prevent his participation in a rulemaking pointing toward deregulation of the trucking industry. In speeches and other statements the Chairman had indicated that he favored deregulation, and this the truckers urged was disqualifying. Here only notice and comment procedures were being employed; a factual as distinct from policy component in the Chairman's statements was hard to identify; and his comments were generally milder and more guarded than those of Chairman Pertschuk. When Chairman O'Neal declined to disqualify himself, the truckers unsuccessfully sought injunctive and declaratory relief in federal district court.[11]

In a third case, Carol Foreman, an Assistant Secretary of Agriculture, was participating in an informal rulemaking proceeding concerned with the proper method for marking the net weight of retail meats. She had made some remarks suggestive of a point of view in the rulemaking while addressing a consumer group convention. She had also been closely connected with the award of a contract to conduct research possibly bearing on the rulemaking—and the contractor was the private organization from which she had come to the government. For these and related reasons, she was alleged to be carrying forward the private interests of her previous employer and hence to be an improper decisionmaker in a public proceeding; disqualification was refused, largely on prematurity grounds.[12]

Finally, a controversy arose when Dr. Eula Bingham, Administrator of the Occupational Safety and Health Administration (OSHA), gave a speech to one group highly interested in the outcome of a rulemaking, after the public comment period had closed but about two weeks before publication of the rule in final form. She indicated firm views on several strongly contested issues, described her forceful political efforts within the government to obtain a rule, and invited her listeners' political support for the incumbent administration in forthcoming elections.[13] The rulemaking was conducted in hybrid fashion with

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[9] Association of Nat'l Advertisers v. FTC, 460 F. Supp. 996 (D.D.C. 1978).

[10] No. 79-1117 (D.C. Cir. Dec. 27, 1979), cert denied, 100 S. Ct. 3011 (1980).

[11] Assure Competitive Transp., Inc. v. ICC, 45 Ad. L.2d 1134 (D.D.C. 1979).

[12] Grocery Mfrs. of America v. Foreman, Civ. No. 78-2245 (D.D.C. Dec. 27, 1978), appeal pending, No. 79-1440 (D.C. Cir.).

[13] The following passages, excerpted in the petitioner's brief, convey the flavor and range.

> Brothers and Sisters . . . .
>
> Now I want to tell you that we are going to have a Lead Standard. I am determined, Secretary Marshall is determined, and I'm convinced that the President is committed. I can tell you that Secretary Marshall and I have been through the palace guard once to see him about a standard, and if we have to go through that palace guard again, we shall . . . .
>
> I think that there may be some apprehension because Assistant Secretaries in the past have not always understood, or have not known how to spell the words medical removal protection, or rate retention, or whatever the word is that you choose to use. Well, I learned to spell those words a long time ago on the Coke Oven Advisory Com-

cross-examination permitted as to "crucial issues";[14] it is to be reviewed on the basis of a "substantial evidence" standard. The lead industry unsuccessfully argued to the D.C. Circuit that the Administrator's address reflected disqualifying bias that invalidated the outcome.[15]

Taken together, these cases suggest both an upwelling of controversy about disqualification issues in informal proceedings, notably rulemakings,[16] and a range of possibly determinative variables bearing on the controversy. All those seeking disqualification have begun with the more or less familiar judicial analogy. The responses of the administrators concerned in refusing to disqualify themselves have in part been to assert that no judge in like circumstances would be compromised. But they have also stressed that other factors make the judicial analogy inapposite for rulemakings.

One such factor is suggested by the significant structural differences between rulemaking and adjudication. Rulemaking typically requires the rulemaker to formulate proposals. That responsibility suggests a general duty to acquire expertise and perspective regarding the setting in which the rulemaker is to act; and a specific need to reach the prejudgments necessary for making a particular proposal and choosing preliminarily among possible formulations of it. Choosing cases for prosecution is often separated from deciding those cases; but the function of proposal formulation could not comfortably be separated from the function of rulemaking itself. The decision how effort is to be allocated in policymaking is indistinguishable from policymaking, and must be lodged at the

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> mittee, and if you want to know how I feel about it, you need only to look up my comments during those Committee Hearings. As far as I'm concerned, it is impossible to have a Lead Standard without [rate retention] . . . .
>
> I have told some people that I have never aspired to be an economist, but I tell you I can smell a phony issue when I see one. And to say that safety and health regulations are inflationary is phony . . . .
>
> . . . .
>
> Between now and next Tuesday (election day), I'm gonna ask that each of you in this room do a couple of things. First of all, look at the people who are running in your state, in your congressional district. And look at those people and see which ones care about people and working men and women. These individuals can make a big difference in your lives, and you know it. I can tell you right now that a big difference will be made if a Dr. Roy is elected in Kansas, and some of our people are returned to Congress, such as Martha Keyes in Kansas, and a Bob Krueger in Texas, would make a big difference. And that's what I'm really asking you to do is go out and do what you can between now and Tuesday to make a big difference to us all.
>
> And I'll do my job, and I don't know how you're gonna help me, but I'm sure you will.

Consolidated Brief of Industry Petitioners and Intervenors at 25-27, United Steelworkers of America v. Marshall, No. 79-1048 (D.C. Cir., filed Aug. 15, 1980).

[14] 29 C.F.R. § 1911.15(a)(3) (1979), implementing § 6(b) of the Occupational Safety & Health Act, 29 U.S.C. § 655 (1976)

[15] United Steelworkers of America v. Marshall, No. 79-1048, slip op. at 17-23 (D.C. Cir. Aug. 15, 1980).

[16] This Article has been written with informal rulemaking principally in view. Many of its observations, however, could also be made respecting forms of on-the-record adjudication that are strongly policy oriented in character, most notably initial licensing. Separation of functions is not required under the APA in on-the-record licensing proceedings, 5 U.S.C. § 554(d) (1976), suggesting lesser scope for disqualification in these proceedings as well.

center.[17] It follows that the discussions and judgments antecedent to a proposal for rulemaking cannot, by the simple fact of their occurrence, disqualify. That is not to say that tentativeness in reaching these judgments is unimportant; or that a demonstration of unshakeable prejudgment might not be thought the occasion for disqualification. But if some measure of prejudgment is essential or inevitable in the preliminary stages of rulemaking, to that extent at least disqualification is foreclosed.

Similarly, in the current state of law, rulemaking is regarded as an appropriately institutional, not individual, decision. A result is that to the extent disqualification is a concern at all, it may be a concern for a larger and less certain number of agency employees than would be thought implicated in adjudication. Even when required to act "on the record," a commissioner is unconstrained by statutory or constitutional separation of functions requirements in rulemakings. The sifting and analysis by competent subordinates, which would in any case be permitted,[18] need not exclude staff members who participated in formulation of the rule and presentation of information bearing on it.[19] More important, significant aspects of decision are likely to have been given effective final shape below the highest levels of the agency.[20] Consequently, the field of agency personnel ultimately identified as decisionmakers may be much larger than would be the case for on-the-record adjudication. In an adjudication, it is not hard to identify those who reach the holding of an opinion, and perhaps the few who help to write any explanation; in rulemaking, the decision lies in a text whose formulation can involve a sizeable proportion of an agency's management-level staff. That disqualification rules would have to reach so broadly is an additional consideration constraining simple application of the judicial model.

Rulemaking can also be differentiated from adjudication on the basis of the differing relationships of those two procedural forms to other roles that administrators are called on to perform. Decision in an individual case, at least as distinct from its policy or rule component, is of limited institutional concern to Congress, the President, or those generally affected or protected by regulation. Our political and legal traditions exclude the calling of judges before legislative committees to explain their decisions, the clearing of proposed decisions with the President, and nonparty intervention.[21] But we have no such traditions for policymaking divorced from the decision of particular cases. Congressional oversight of administrative policymaking is generally regarded as a good, and current trends are to increase it; so also for Presidential controls. While dispute has very recently arisen over whether these controls must be publicly exercised, the legitimacy of the controls themselves is generally conceded.

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[17] This point is central to the prevailing opinions in the *ANA* case, slip op. at 20, 33-38 (Tamm, J.); id. at 4 (Leventhal, J., concurring). Compare the requirement in Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978), for semiannual publication by agencies of their rulemaking agendas. The basic thrust of that order, and of much thinking about rulemaking endeavors today, is to insist on increasing involvement in and responsibility for rulemaking at the top. Such changes can be effected only at the cost of enhanced "prejudgment."

[18] Morgan v. United States, 298 U.S. 468 (1936).

[19] See, e.g., Hoffman-La Roche, Inc. v. Kleindienst, 478 F.2d 1 (3d Cir. 1973); American Tel. & Tel. Co. v. FCC, 449 F.2d 439 (2d Cir. 1971); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir.), cert. denied, 338 U.S. 860 (1949). As is pointed out in an NRC draft report, A Study of the Separation of Functions and *Ex Parte* Rules in Nuclear Regulatory Commission Adjudications for Domestic Licensing 123-28 (1980), the recent decision in Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977), has placed this proposition in some doubt for the future.

Section 12 of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980), added a new section 18(f) to the Federal Trade Commission Act, 15 U.S.C. § 15a(k), specifically imposing separation of functions requirements as to "any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record."

[20] See, e.g., Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38 (1975); National Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1145-46 (2d Cir.), cert. denied, 419 U.S. 874 (1974).

Similar differences characterize administrative relations with interested parties outside government. Businessmen who have no need for hints how a particular case will be decided have a legitimate and pressing concern to learn "the drift of current policy thinking and planning" at relevant agencies, so that they may shape their own activities. The hope that businessmen will shape those activities toward compliance, or that knowledge of the emerging thought will provoke them into providing information permitting more effective regulation, warrants the agency's personnel in giving the hints and even in seeking out opportunities in which to do so. More diffuse public groups, too, have a claim to hear and be heard on questions concerning the agency's course. Again, there may be questions whether the interchanges—at the least, those clearly pointed toward a particular rulemaking—need to be public; but their value is generally recognized. Disqualification rules need to be consistent with the occurrence of these events. If attending convention lunches and speaking to "issues of the day" is a legitimate part of a rulemaker's function, he ought not be disqualified merely for having done so.

Related to this proposition is the appropriately political character of appointment to positions of responsibility at the top of the administrative hierarchy. While judges, too, may in part be selected for their political leanings, no sense of apology attends that principle of selection in the administrative sphere. Unlike judges, administrators have a fixed program to carry out, and their success or failure is measured by their ability to achieve politically defined policy ends. If policy commitment is a measure of sound appointment, it would be surprising to find it disabling.

Another frequently distinguishing characteristic of rulemaking concerns the nonspecific character that often attaches to factual controversies. To be sure, rulemaking spans a notoriously diverse set of procedures and contexts, from formal, on-the-record rate-setting premised on ascertainable and historical facts about particular corporations to informal standard-setting based substantially on political attitude or on feel for future developments. Rulemaking may produce standards of general impact on large parts of society, or have the effect of resolving particular disputes affecting discrete parties with specific interests unusually at stake. Generalization is therefore fraught with hazard. There is nonetheless agreement that factual disputes in rulemaking most frequently concern issues that, if decided by a court at all, are decided under the rubric of judicial notice rather than trial. "Are children manipulated by television advertisements?" more closely resembles "Are children disadvantaged by segregated education?" than "Was Jones fired for reasons of race?" The questions may be susceptible of definitive answer or engender great controversy, but there would be no constitutional objection to having them decided by a legislature using the most informal procedures; the basis for Jones's discharge, a question unique to the case in which it arises, cannot be so decided against Jones's interest.

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[21] Nonparties may appear, of course, as amici curiae—generally helping the court assess the possible sweep of a given result more than helping it decide the particular case. In general, amici are not invited, and their participation is permissive. Amici appearances are not a central feature of judicial decision; they reflect an accommodation to our recognition that judicial decisions sometimes have broad policy consequences for which judicial decisions on the usual model may prove inadequate. From this perspective, the need for amici in a given case calls into question more than it reinforces such other elements of the traditional model as independence from the political branches.

Finally, in considering the question of disqualification one must take into account the high current levels of controversy over appropriate rulemaking procedures generally. As a matter of description, the differences in structure, institutional character of decision, relationship to other agency roles and actors, and general nature of facts to be determined, all would probably be agreed upon as distinguishing rulemaking from adjudication. Nonetheless, current scholarship and judicial decisions reflect disquiet about rulemaking as traditionally understood.[22] The disqualification issue is touched by these controversies, particularly by such questions as the extension of "ex parte" concepts to rulemaking,[23] the protection of rulemaking from Presidential or congressional influence or pressure,[24] and the extension to rulemaking of separation of functions constraints currently prescribed by statute only for formal adjudication.[25] Each of these controversies could be said to involve, in a general way, the disputants' estimate of the importance of "impartiality" or "objectivity" in rulemaking. Is this a political activity integral to the daily functioning of the agency as a whole and so subject to all the influences that may come to bear on that functioning? Or is it, and if so to what degree and in what circumstances, to be dissociated from the political, from the hurly-burly, and conducted antiseptically? The former view produces a model of administrators who approximate congressmen, and thus discourages disqualification; the latter suggests the setting for judicial activity and so encourages the importation of judicial standards.

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[22] The controversies are well analyzed in DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Va. L. Rev. 257 (1979).

[23] Nathanson, Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377 (1978); ACUS Recommendation 77-3, 1 C.F.R. § 305.77-3 (1980).

[24] The Conference has currently pending a study of this problem by Dean Paul Verkuil, see page 943 supra.

[25] The Conference has currently pending a study of this problem by Professor Michael Asimow. See Ross, ABA Legislative Proposals to Improve Administrative Procedures in Federal Departments and Agencies, 27 Ad. L. Rev. 395 (1975); Davis, Revising the Administrative Procedure Act, 29 Ad. L. Rev. 35, 42-43 (1977); Pedersen, The Decline of Separation of Functions in Regulatory Agencies, 64 Va. L. Rev. 991 (1978).

How, then, are we to proceed? The following pages begin at the outer limits of analogy, where general agreement exists respecting the constraints appropriate for the analogous procedures, and then work toward the center. The first limit examined is suggested by the conflict of interest rules prohibiting legislators and executive officials from participating in certain decisions. If particular conflicts of interest would or should be regarded as disqualifying even in a legislator or executive official, it is supposed here that they should be disqualifying for a rulemaker, however political we may regard his function to be. An examination of current trends in thinking about conflicts of interest and the reduced political controls over most rulemakers may suggest additional measures beyond those appropriate for an elected legislator or executive. The second limit examined, the one most frequently reasoned from in the cases, consists of the disqualification rules applicable to judges (and, by derivation, administrators acting as judges). If some relationships to parties, facts, or issues would not be treated as disqualifying even in a judge, the rulemaker can hardly be disabled. In particular, if judges are not disqualified for their prior exposure to social fact or their political or policy views, rulemakers are by hypothesis similarly free, whatever restraints are placed on the way in which they acquire, process, and use information. Indeed, given the more focused policy responsibilities of administrators and the political considerations that, legitimately, so often underlie their appointment, disqualification for policy views would be astonishing.

II. CONSTRAINTS ON POLITICIANS: THE CONFLICT OF INTEREST MODEL

A. *Congressional, Executive, and Professional Disqualification*

If one searches outside the administrative and judicial realms for indications of conduct or associations regarded as disqualifying from participation in government action, one finds broad agreement that personal financial interests are disqualifying, and little else. Thus, the provisions of the United States Code dealing with bribery, graft, and conflicts of interests[26] prohibit paying (or receiving payment) for the assistance of governmental officials at all levels, and prohibit government employees from personal and substantial participation in a "particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving . . . or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest."[27] The limitation of disqualification to present,

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[26] 18 U.S.C. ch. 11 (1976).

[27] 18 U.S.C. § 208 (1976). Section 208 applies only to executive branch, independent agency, or District of Columbia employees, but like constraints govern the judiciary and the legislative branch. See, e.g., Senate Manual, S. Doc. No. 1, 95th Cong., 1st Sess. Sen. rule XLV, § 8 (1977).

Although the reference to "particular matter" could be taken to exclude the application even of this limited provision to rulemaking, § 208 is generally understood to apply to rulemaking as well as adjudication or contract or grant activities. Other sections in Chapter 11, notably 18 U.S.C. § 207, treating the disqualification of former officers and employees, refer to "particular matter involving a specific party or parties." The absence of the "specific party or parties" qualification in § 208 is generally taken to signal its application to rulemaking. S. Rep. No. 170, 95th Cong., 1st Sess. 48 (1977). A view that the reference to "a specific party or parties" was not intended to suggest any financial interests is striking; not only is no disqualification imposed where the specified ties have been broken, but a Nuclear Regulatory Commission employee may remain an officer of the Sierra Club or the Business Roundtable, or seek employment with the Union of Concerned Scientists, without violating the Act.[28]

The rules of both houses of the Congress make similarly limited judgments about disqualification. A member who has a "direct personal or pecuniary interest" is excused from voting—but the rules stress the need for a uniquely personal impact. Thus, members of the House who held New York State or City bonds were not disqualified to vote on a measure authorizing emergency guarantees of state obligations; their possible interest in the outcome was broadly shared in the community at large.[29] Senate conflict of interest rules on voting apply only to legislation principally aimed at furthering the pecuniary interest of the Senator personally, his family, or a limited class of persons to which he belongs. Employees of Senate committees are directed only to divest themselves of any substantial holdings that may be "directly affected by the actions of the committee" for which they work, and that only if they earn more than $25,000 annually and work more than ninety days.[30] Other than financial disclosure rules, criminal restraints on bribery, and occasional sensitivity about focused serving of self-interest, few limits are imposed on a congressman's use of his considerable authority.

Recent events provoking public interest in the probity of governmental officials, most notably the Watergate scandal, have prompted fresh examinations of the conflict of interest problem. The resulting new standards, however, fit the established pattern; they have been almost entirely limited to issues of financial self-interest. The Ethics in Government Act of 1978[31] provides intimately for the filing of reports about financial interests and institutional responsibilities, and creates a new bureaucratic mechanism to administer federal conflict of interest standards, but makes essentially no change in the legislative statement of those standards. As distinct from continuing personal or financial interests, the knowledge or attitudes an individual brings to government still are not an apparent matter for ethical or oversight concern.[32]

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difference between the sections is expressed in Jordan, Ethical Issues Arising from Present or Past Government Service, in ABA, Professional Responsibility 177 n.21 (1978). In Mr. Jordan's view, however, neither § 207 nor § 208 applies to general rulemaking.

[28] Agency and judicial practice has occasionally been more demanding. Thus, the Internal Revenue Service has regarded religious scruples as disqualifying individuals from participating in determining the exempt status of an organization involved in abortion. And a commissioner of the Equal Employment Opportunity Commission was held to have erred in participating in an agency rulemaking, where she was considering taking a nonpaying position with a women's rights organization that had declared its stand on the issue she was to vote upon. Air Transp. Ass'n v. Hernandez, 264 F. Supp. 227 (D.D.C. 1967).

[29] See H.R. Doc. No. 403, 95th Cong., 2d Sess. 313 (1979) (rule VIII); 121 Cong. Rec. 38,135 (1975); see also *ANA*, slip op. at 28 n.9 (MacKinnon, J., dissenting in part and concurring in part).

[30] Senate Manual, S. Doc. No. 1, 95th Cong., 1st Sess., rule XLV, § 8 (1977) (effective April 1, 1978).

[31] Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified in part at 5 U.S.C. App.).

[32] In its provisions governing the conduct of former employees after leaving government service, the Ethics in Government Act is principally limited to matters "involving a specific party or parties," not rulemaking. Participation in rulemaking activities is affected only by new 18 U.S.C. §

Contemporary standards of the legal profession also suggest few occasions for disqualification in legislative or policy making activities (as distinct from matters involving "a particular party or parties"), although a trend toward recognizing a need for disqualification may exist. Thus, disciplinary rule 9-101(B) of the Code of Professional Responsibility states that "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a government employee," but the current ABA interpretation of this phrase excludes rulemaking:

> [W]ork as a government employee in drafting, enforcing, or interpreting government . . . regulations . . . does not disqualify the lawyer under D.R. 9-101(B) from subsequent private employment involving the same regulations . . .; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.[33]

This reading, which has been strongly criticized,[34] does not obviate the possibility that a lawyer would be disqualified for a different reason—that a particular controversy might require or appear to require him to violate the confidences of his former (government) client, contrary to canon 4 of the Code of Professional Responsibility. As now written, the Code imposes no explicit disqualification on the government lawyer who comes from private practice, beyond the obligation to preserve a former client's confidences.[35]

207(c), which applies to former holders of significant decisionmaking or supervisory responsibilities—at least the GS-17 level—and prohibits for one year their personal efforts to influence determinations of or substantially affecting their former agencies. The obvious concern of this provision, which applies to all matters before or affecting the agency, is with misuse of the influence or friendships acquired in a former position of authority. A matter need have been neither pending nor included within the former civil servant's responsibility or personal work docket to fall within the ban of § 207(c). At the end of a year, § 207(c)'s prohibition on advocacy ceases; and during that year the former civil servant may freely advise new colleagues respecting their own appearances.

[33] ABA Formal Op. No. 342, 62 A.B.A.J. 517, 519 (1976).

[34] Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Op. No. 889, 31 The Record 552, 557-58 (1976); Jordan, supra note 27, at 194-97. The criticisms nonetheless recognize the practical difficulties inherent in an approach that might seem to bar a former Commissioner of Internal Revenue, say, from future tax consultations for any client, and apparently would accept the District of Columbia Bar proposal discussed in note 35 infra as an appropriate means for dealing with the problem.

[35] This obligation is routinely observed by government attorneys, who may give standard instructions that they are not to be consulted on matters particularly concerning the interests of a former client. Typically, although not invariably, these instructions are limited to "particular matters" (i.e., adjudications, rulings, etc.) in which a former client or law firm is involved, and government lawyers do not refrain from participation in rulemaking because they learned facts in private practice possibly bearing on the outcome. Disqualifying oneself from a rulemaking in which a lawyer or his firm has been an active participant or (particularly) initiator appears to be regarded as the better practice by those agencies considering the matter.

Recent proposals by the Board of Governors of the District of Columbia Bar, made after long and intensive debate, would impose certain disqualifications respecting rulemaking, but are strikingly limited in their application to general policymaking activities. Final Report of the Legal Ethics Committee, 3 Dist. L. 44 (Aug.-Sept. 1978). Although new public employees would have to disqualify themselves permanently from any "matter" in which they "participated personally and substantially while in private practice or employment," and for one year from "matters" involving recent former clients or law associates, the proposal established no explicit restriction on an entering government

B. *Conflict of Interest Disqualification in Agency Rulemaking*

1. *Current Practice*. The current regime for conflict of interest regulation in the civil service owes its shape to Executive Order 11,222, promulgated during the Johnson administration, and the implementing Office of Personnel Management regulations.[36] Under these rules, all federal agencies are obliged to have in place regulations governing employee responsibilities and conduct. These regulations are generally understood to be concerned with conflicts of interest as distinct from prejudgment as such. They set out in rich detail the financial holdings and outside employment permissible for government employees and (as to the first) their immediate families; to enforce these constraints, high level employees file annual reports for review by agency counsellors. Originally confidential, the reports of senior employees are now available to the public, under the Ethics in Government Act.[37] On the basis of the reports, and following procedures provided for in varying detail, apparent conflicts are identified and remedies, including disqualifications, are worked out.

Some universal characteristics may be listed, few surprising and most reflecting the criminal provisions already discussed. An employee may not participate in a matter in which he or an immediate family member holds a financial interest, unless by rule or special determination the interest has been found so slight as to be waivable. He may not participate in a matter involving one with whom he is negotiating for possible future employment or accept outside employment that could cause conflicts with his government position. The procedures provided for enforcing these constraints are internal, arising either from the employee's identification of a problem or from the process of reviewing the annual statements. The rules are designed to pick up financial interests and associational interests of a commercial or financial character. Political, religious, or civic associations need not be reported; activities on behalf of such organizations are outside the "other employment" constraints. Neither the Executive Order model nor the rules of most agencies deal with possible conflicts arising out of *prior* employment, or provide for a "cooling off" period during the first years of government service.

In responding to an Administrative Conference inquiry in connection with this study, agencies generally agreed that conflict of interest rules, in the usual limited sense connoting present financial or associational conflicts, apply in rulemaking as in other forms of agency action. The statutory provisions and the

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counsel's participation in rulemaking of general applicability. For counsel leaving government office, it proposed a five-year moratorium on counselling or representation with respect to the adoption or validity of any rule which counsel participated "personally and substantially" in drafting, proposing, or adopting. See generally Opinions 71 and 78 of Committee on Legal Ethics of the District of Columbia Bar (June 26 & Nov. 20, 1979). Even were the broader prohibitions on participation in "matters" thought to apply, these prohibitions stem from client relationships and work associations, not prior opportunity to acquire knowledge or formulate views that might be relevant to the proposals under examination. On April 17, 1980, the D.C. Court of Appeals issued proposed rules that did not include these proposals. Legal Times of Wash., Apr. 28, 1980, at 8.

[36] 3 C.F.R. § 130 (Supp. 1965); 5 C.F.R. §§ 735.201-735.210, 735.401-735.412 (1980).

[37] 5 U.S.C. App. (Supp. II 1978); implementing OPM regulations are at 5 C.F.R. §§ 735.501-735.508 (1980).

Executive Order can be read to take in all forms of governmental action; the public would expect its servants to be free of self-serving in policymaking contexts as much as in other forms of administration. There would seem, then, little reason to pause over applying core conflict of interest precepts to rulemaking activity.

Nonetheless, a very few agencies appear to regard the provisions for disqualification from particular matters as not reaching general rulemaking.[38] Other agencies treat any possible concern as answered by the increasingly common flat prohibitions on any ownership of stock in regulated companies. Although the flat prohibitions present the most egregious conflicts, policymaking of a general character may well have significant, but often hard to anticipate, effects on a broader range of financial interests—and the prohibitions divert attention from these effects. Thus, an employee of the Food and Drug Administration (FDA) is much more likely to understand and accept that he cannot own stock in Warner-Lambert, a regulated producer of veterinary medicine, than that his ownership of part interest in an unregulated beef feed lot precludes participation in a general rulemaking concerning quality standards for animal food additives.

As a technical matter, the conflict of interest provisions do apply to this situation. The Department of Justice, in response to an FDA inquiry, was clear that 18 U.S.C. § 208(a) would reach an investor in feedlot operations who participated in an advisory committee's deliberations about continued use of antibiotics in animal feed to avoid illness and promote growth; the section "applies to any discrete or identifiable decision or recommendation, or other matter even though its outcome may have a rather broad impact. . . . A benefit conferred on an industry generally can be as much of a boon to a firm within that industry as a competitor's going out of business."[39] As the Department noted, the statute provides a mechanism for dealing with de minimis situations—published waiver either in the individual case or by general rule if it can be concluded that a given interest could not affect the integrity of employee services in *any* context. And, it thought, disqualification could not be imposed for an outcome that affected the firm "merely as a member of the general public or as part of the entire business community."

Yet not inconsiderable arguments favor the more limited approach of simply banning holdings in regulated industries. To put employees at peril of anticipating the side effects of rules, or even of knowing the roster of those volunteering at various times their comments in a rulemaking, is to impose a greater burden than that of staying aware of the parties in a discrete proceeding; and is to impose that burden without substantial gains for effective government as a balancing factor. In general rulemaking, the very fact that impacts are diffuse and often unpredictable suggests less need to guard against their warping influence. The diffuseness also means that disqualification would produce greater inhibitions on employee investment—a freedom significant to them. Finally, what rises above a de minimis level for concern in this setting—an interest to be compared with, say, the consumer interest in food prices and quality—is hard to identify from the public's perspective.

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[38] E.g., 10 C.F.R. § 1010.302(a)(1)(ii) (1979) ("particular matter" defined to exclude rulemaking) (Dep't of Energy); 39 C.F.R. § 3000.735-302(c)(2) (1979) (same; Postal Rate Comm'n); 17 C.F.R. § 200.60 (1979) (SEC). The regulations of the Department of Transportation, unusually full in this respect, state that the test of an "other particular matter" is whether the employee's participation "will have a direct and predictable effect on the financial interest referred to . . . ." "[T]he words . . . do not necessarily include rule making of wide applicability, the formulation of general policy or standards, or similar matters of broad scope." 49 C.F.R. § 99.735-15(c) (1979).

[39] Letter from Ass't Att'y Gen. John Harmon to Richard Cooper, Chief Counsel, FDA, dated June 29, 1978, at 4, 8.

The area of possible dispute here could be reframed in policy terms: would it be appropriate for an agency to provide by rule that employee investments likely to be affected by, but not directly subject to or benefiting from proposed regulation, are deemed insufficiently substantial to affect the integrity of employee services?[40] If the risk of unseemliness in such a rule is excessive, might the agency set a relatively high level of total investment, beneath which the risk is regarded as de minimis? An agency might, for example, subject an employee to disqualification in rulemaking only if his investments were (a) in a corporation to be subject to the proposed rule or its immediate beneficiary, or (b) in a corporation likely to be affected by the regulation in a manner substantially distinct from the public or business community at large *and* exceeded $25,000 in value. Unless we are at the point of limiting government employee investments to general mutual funds and like ventures, some such accommodation seems required; that accommodation would be entirely consistent with—indeed more demanding than—constraints currently observed in Congress and among its staff, and apparent general practice.

2. *"Cooling Off" Periods?* Conflict of interest disqualification is generally limited to *present* conflicts, making no provision for the impact of prior associations once ended. Section 207 of the Criminal Code, as amended by section 501 of the Ethics in Government Act, provides for certain post-employment restrictions; the more stringent of these apply only to "particular matter[s] involving a specific party or parties"—not general rulemaking—but high level employees are forbidden to seek to influence *any* matter before their former agencies, including rulemaking, for one year after leaving government office.[41] No similar constraint exists on dealing with the interests of former employers while a government employee.

Specific instances of such constraints do exist. Under the Department of Energy's (DOE) reorganization legislation, former employees of "energy concerns" may not participate at a supervisory level for one year after leaving that employment, in a proceeding other than general rulemaking in which their former employer is interested. If an employee was substantially involved in or responsible for an energy concern's participation in a proceeding, whatever its character, during the five years before joining the Department, he may not participate in that proceeding for one year after joining.[42] The Civil Aeronautics Board (CAB)[43] by rule and the Federal Communications Commission (FCC), the Internal Revenue Service (IRS), and doubtless other agencies by practice impose similar restraints. Guidelines adopted by the incoming Carter administration for political appointees called for recusal from particular matters in which a recent prior employer had a substantial financial interest.[44] And for attorneys, as earlier discussed, the rules of professional conduct prohibit participation in "matters" on which an attorney has worked for a former client, without time limit.

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[40] Compare the Department of Transportation rule, supra note 38.

[41] 18 U.S.C. § 207(c) (Supp. II 1978).

[42] 42 U.S.C. §§ 7212, 7216 (Supp. II 1978); 10 C.F.R. §§ 1010.302(b), 304(b) (1979).

[43] 14 C.F.R. § 300.9-.10 (1979).

Provision at least for a cooling off period, and perhaps for permanent disqualification where an employee's contact with rulemaking in private employment had been personal and substantial, would be consistent with the current trend toward increasing separation between private and public employment, and could help allay suspicions about the "revolving door."[45] As a general matter, one must recognize that any such change occurs at the costs of depriving government of some—or possibly all—assistance by qualified and involved persons, of making government employment marginally less attractive (threatening to that extent the quality of the civil service), and of making personnel administration marginally more expensive—as the complexities of determining who works on what issues and the number of occasions on which relevant expertise must be sacrificed both increase.[46]

For analytic purposes, it may be useful to separate the question of a cooling off period from that of permanent disqualification. The latter measure is obviously more severe; it is not imposed by statute on any persons entering federal service, and for the legal profession and post-government employment such restraints are clearly limited to particular matters involving a specific party or parties in which the employee has substantially and personally participated. These limitations reflect policy considerations of major importance. Disqualification from one or several "particular matters involving a specific party or parties," as a government employee or after government employment, reaches the heart of concerns respecting conflict of interest, yet imposes only limited, manageable inhibitions on present government service or future private career. The range of disqualification is discrete, and suggests no disability to deal with political issues—only particular disputes. One is unlikely to be dissuaded from entering government service or discouraged from leaving it by these limited constraints, and the government as employer is not denied all use of the employee's experience and views. Such disqualification addresses the setting that marries the greatest risk of conflicted loyalties with the largest chance that confidences of the prior employer will be betrayed. Its limited range at the same time restricts the threat to the employee's utility in his new job, and eases identification of the settings in which it applies.

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[44] Ethics Statements, 35 Cong. Q. Wkly. Rep. 56 (Jan. 8, 1977).

[45] In discussing cooling off periods, we are addressing the employee who has completely and finally severed his connection to his prior employment, should there be an expectation of return, the employee is in a situation of present, actual conflict.

[46] The difficulties of assessing these costs and the cautionary implications to be drawn from them are well illustrated in Professor Morgan's recent study for the Conference, Appropriate Limits on Participation in Matters Before an Agency by a Former Agency Official, (Exposure Draft) (1979), leading to ACUS Recommendation 79-7, 45 Fed. Reg. 2309 (1980) (to be codified in 1 C.F.R. 305.79-7). Although the Conference had no occasion to endorse Prof. Morgan's sharply skeptical questioning of the empirical base for post-employment restrictions or his observation that analogous restrictions arising from pre-employment activities should be observed, the tone of the recommendation suggests basic agreement with him. See also R. Vaughn, Conflict-of-Interest Regulation in the Federal Executive Branch (1979).

The extension of disqualification to rulemaking is seen to involve much larger constraints, in the service of a more diffuse fear of conflict. The broadly shared concerns of a general rulemaking proceeding do not suggest the possibility of self-dealing as sharply as do the particular issues of a proceeding involving a limited number of specific parties. Disqualification now suggests that the government is deprived of experience and policy view, perhaps the very basis on which the official was chosen; or that the individual concerned must fear far larger inhibitions on his future career. To be sure, this is a polar contrast; in some rulemakings the interests of a limited number of parties may be at unique and substantial risk.[47] But historically rulemaking has been viewed as an activity distinct from the decision of particular, concrete controversy. If one accepts the contemporary judgment that permanent disqualification from participation in general rulemaking is not warranted for the former government employee, then permanent disqualification is also unwarranted in such circumstances for the new government employee. The practical judgment of the past has been that these dangers are too diffuse to support, even for professionals pledged to honor a client's confidences, the very large inhibitions on government choice and employee mobility that would result from general disqualification.

This conclusion does not eliminate the risk of conflicted loyalty or betrayed confidence for the employee who switches camps in the midst of a rulemaking—even one not directly involved in the rulemaking in his former employment. The impact of disqualification in such circumstances may be reduced while still attempting some control over the risk by limiting the duration of disqualification rather than the occasions for it. This appears to be the judgment reflected in the ''cooling off periods'' in place at the DOE and CAB.

At least three approaches are possible for a ''cooling off period'' disqualification. First, as the government now imposes on former high level employees, temporary disqualification could extend to *all* dealings ''on the merits'' with the former employer. A second approach, the CAB formula, would preclude employees from working on any matter that was within their official responsibility while in private employ, including rulemaking. The third approach is that embodied in the DOE legislation: a supervisory employee may not act for a time in any matter in which his former employer is interested, other than general rulemaking, or in any matter in which he participated. Each of these formulas embodies compromises reflecting the costs to government of inhibiting job mobility for its present and future employees. In two cases, the restriction is limited to the higher levels of the bureaucratic structure.[48] Permission is not withheld to advise one's new employer under the Ethics in Government Act or to participate in rulemaking at the DOE or in matters outside former responsibilities at the CAB; each formulation preserves the possibility of acting in some circumstances even though the former employer's interests are involved. One need not choose among the formulations to note that an absolute cooling off period applicable to every employee would exceed any contemporary judgment of sound practice.

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[47] The spectrum of possibilities, and the difficulty of drawing appropriate distinctions, is similar to that which the Administrative Conference has already faced in connection with its analysis of ***Home Box Office***, see note 23 supra.

[48] Individuals holding these positions, it might be thought, have the greatest degree of influence over the outcome of government deliberations, and the greatest job mobility even in the face of

Of particular interest for these purposes is the exemption under the Department of Energy Act for participation in general rulemaking. The FCC reports that its more informal practice is similar: in a general rulemaking in which a former employer is one of several participants, commenting as it ordinarily would on a matter of interest to it, a new FCC employee need not withdraw unless he himself was involved in the development of the former employer's position. If the former employer's interests are more directly at stake, then withdrawal is expected. Viewed from the perspective of impact on the former employer, of course, neither the numbers involved nor the generality of the principle proposed necessarily reduces its stake in the outcome. It may still stand to gain or lose mightily, and to that extent the possibility of conflicted loyalties may still appear to advise caution. The FCC practice has overtones of a different consideration: that where the comments may fairly be regarded as "routine," the employee need not withdraw; where the stake is special (even if large numbers may be involved), he must. Such consideration *would* tend to keep the risk of conflicted loyalties in check; but it is not clearly the practice at the FCC, and is not the requirement applicable at the DOE.

The rulemaking exception, it may be inferred, comes as much from the character and needs of rulemaking as from assessment of the risks of conflict. Several of the responding agencies, discussing generally the need for disqualification procedures in rulemaking, remarked that the large number of individuals who dealt with any given proceeding was itself a safeguard of objectivity in the process. At the same time, and somewhat paradoxically, one could believe that in the setting of general policy an agency has the greatest need to exercise its entire intellectual structure. The institutional process of decision depends on having the full resources of the institution available for decision and—because the full resources are used—is less threatened than would be a judicial process by distortion in any particular part.

3. *Redefinition of the Interests that Possibly Conflict?* Present financial and occupational conflicts are disqualifying in rulemaking and, for the short term, past ones perhaps should be. Do these judgments extend to occupational conflicts in which the interests of the prior or coordinate employer are not "financial" in character? Liberalized standing rules, and with them vastly expanded participation in agency proceedings, spring from recognition that agency decisions affect interests other than monetary ones—aesthetic, recreational, environmental, etc. Appreciable numbers of individuals have come to government service during the

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such constraints. Descending the bureaucratic ladder, it may be surmised, brings one to individuals whose policy influence is not great, whose mobility might well be impaired by constraints on dealing with this or that particular issue within their ordinary ken, and on whom, indeed, the government has a greater need to rely for hard technical advice.

present administration from organizations active in administrative litigation and rulemaking on behalf of those interests. Some doubtless maintain their membership or even officership in those organizations; if they can be regarded as "charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service or civic" in nature, the organizations are excepted from the ordinary civil service prohibitions on outside employment.[49] Should such associations be disqualifying in particular proceedings in which these organizations participate, to the extent they would be if the organizations' interests were financial in character?

The Department of Energy statute discussed above is limited to former "energy concern" employees, and "energy concerns" are defined to include those regulated by the Department and their service industries, but to exclude others who may frequently have a large apparent stake in the outcome of DOE proceedings. This is consistent with the general focus on *financial* interests. But present and former personal associations can cloud "objectivity" in other ways. It may strike some as odd not to subject to "cooling off" the former employee of the Oregon Public Service Commission or the Union of Concerned Scientists, each of which may have participated vigorously in DOE proceedings and have a substantial institutional stake in their outcome. Retaining active membership in the Friends of the Earth may seem equally a matter of interest, if that organization may be a party. Some agencies, the IRS for example, appear to take the position that at least present relationships of this character are disqualifying; the CAB rules and FCC practice appear to contain no financial interest limitation; the lawyers' Code of Professional Responsibility would recognize little difference between for-profit and not-for-profit clients. Undoubtedly, many government officials do abstain from participation in rulemaking as well as other forms of decision when they or a former client have been involved in the rulemaking as private participants.

If, as in the situations just described, disqualification is limited to circumstances in which the employee himself participated in or shared responsibility for his prior employer's formulation of a position, a principled distinction from the "financial interest" cases is hard to identify.[50] The treachery of switching sides, the obligation to protect confidential information, the unseemliness of appearing possibly to be furthering private interests under the guise of seeking the public good, all counsel against participation. An energy concern's perception that its interests are being unfairly dealt with when its former adversary participates in rulemaking seems no less warranted than the complaints the Environmental Defense Fund might have made before the statute's enactment if an energy concern employee had stepped through the "revolving door" into official responsibility for or participation in a rulemaking. A "cooling off period" in either setting would reflect a heightening of the stated standards. In the past, rulemaking has been regarded as outside this kind of conflict of interest concern; but if it is not, the former employee of a participant with important financial interests in the proceeding and the former employee of a participant with other important and legally recognized interests at stake seem comparably situated.

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[49] 5 C.F.R. § 735.203(3) (1980).

[50] It could be argued, for example, that Texaco employees are likely to perceive employment issues more in economic than in ideologic terms; for employees of the Environmental Defense Fund, the opposite may be true. If one assumes a permanent severance of the prior employment ties on coming to a government job, the EDF employee seems if anything more likely than the Texaco employee to experience a carry-over of his former loyalties. If one assumes that the employee imagines his government service as an interlude to be followed at some indefinite time by return to prior relationships, the former Texaco employee's (hypothesized) continued attention to economic self-interest may distort his actions or judgments; but so may the continued ideological commitments of the former EDF employee. With formal expectations of return, of course, disqualification of both is required.

Cooling off periods might have varying effects at different levels of government. For the civil service employee or one appointed by the agency itself, inability to participate in particular policymaking may be an annoyance, but may rarely threaten the overall character of his employment. For an agency head, on the other hand, or one close to the highest levels of government, inability to participate in any significant number of policy matters may be truly disabling, in practical terms approximating a proscription of employment of an individual so situated. Even on a multimember body, the considerations of diversity of view that initially led to the selection of a multimember format will have been defeated unless each member is generally able to participate in important policy affairs. Moreover, for high level employees, the processes of bringing them into government—nomination by the President and confirmation by the Senate—will have served both as a control of ideological precommitments and as some indication that those commitments have been endorsed as appropriate at the highest levels of the political structure. Thus, even if cooling off periods of the type here under discussion were generally regarded as appropriate, an exception might be made for individuals whose appointments are subject to Senate confirmation. To make such an exception risks having a substantial appearance of questionable conduct; policymakers called on to act in matters with which they had been intimately connected in prior private life have often recused themselves for that reason. Nonetheless, a formal interdiction of participation may be inappropriate.

If one turns to a government employee's outside activity while in government employment, the correspondence between financial interests and interests directly implicated in that activity also seems strong. Government generally disclaims interest in charitable, professional, civic, or other like activities of its employees for important reasons: this minimizes intrusions on employee lives; it recognizes and even fosters civic and religious activity; it reflects the general unimportance of such activities to agency functioning; and it acknowledges the unreliability of membership in an organization as an index of attachment to particular positions. Suppose, however, that proposed rulemaking by the FCC is believed by the American Civil Liberties Union strongly to implicate its members' interests in free speech, and thus leads to ACLU participation. If an agency employee is merely a member of the ACLU, that connotes little or nothing; if, however, he is an officer of the organization, or has participated in drawing up its comments, intuition asserts that a conflict of loyalties may arise as disabling as those we infer from the possibility of financial self-serving. Official responsibility for the preparation of comments, or substantial and personal participation in that activity, creates a conflict whether the interest of the commenter is financial (in which event the employee's participation is a criminal act) or is otherwise recognized as substantial. Disqualification, it appears, should equally flow.

4. *The Six Precepts of Ethical Government Employee Behavior.* A basis for even more radical extension of conflict of interest reasoning could be found in Executive Order 11,222, which sets forth six nonbinding precepts of employee behavior:

> An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:
> (a) Using public office for private gain;
> (b) Giving preferential treatment to any person;
> (c) Impeding Government efficiency or economy;
> (d) Losing complete independence or impartiality;
> (e) Making a Government decision outside official channels; or
> (f) Affecting adversely the confidence of the public in the integrity of the Government.[51]

Like the criminal provisions of 18 U.S.C. § 208, these precepts do not distinguish between rulemaking and other governmental activity, and apply to all. Agency rules generally include them, although the formulations vary greatly from statements ostensibly binding on the employee[52] to the merely precatory.[53] A number of agencies, in responding to the Conference's inquiry, pointed to the precepts (notably (d) and (f)) as a basis for asserting that disqualification could occur in rulemaking. Most acknowledged, however, that enforcement efforts are limited to financial conflicts and associations; and in no agency are the procedures for enforcement adapted to identifying or responding to situations in which "complete independence or impartiality" is lost or "the confidence of the public in the integrity of the Government" is shaken. At present, these matters are left to employee judgment, and the precepts do little more than provide a peg on which a sensitive employee may hang his request to be relieved of particular duties he finds uncomfortable.[54] Should conflict of interest disqualification extend to every action within reach of these six precepts? In particular, should agency heads or employees withdraw (or be required to do so) whenever some action could appear to compromise their "complete independence or impartiality" or to affect "adversely the confidence of the public in the integrity of the Government"?

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[51] 5 C.F.R. § 735.201(a) (1980). The OPM regulations require agencies to issue regulations embodying a number of prescribed standards, but not these. Id. § 735.201.

[52] E.g., 7 C.F.R. § 0.735-5 ("A violation of this part by an employee may be cause for remedial action . . . ."), 0.735-11(a) (1980) (verbatim text of 5 C.F.R. § 735.201(a), supra note 58) (Dep't of Agriculture).

[53] E.g., 10 C.F.R. § 1010.101(a) (1979) (DOE "expects that its employees . . . will avoid any action . . . .").

[54] See, e.g., R. Vaughn, supra note 46, at 35.

Ascribing mandatory force to the precepts would pretermit much of the preceding discussion. While in a formal sense it would remain to determine whether, for example, cooling off periods were required to avoid loss of impartiality, or whether conflict of nonfinancial interests adversely affects the confidence of the public, the venue for that determination would have been shifted to the courts. Since the precepts do not discriminate between rulemaking and other forms of administrative activity, it could be expected that the courts would apply them without making any such distinction. If the precepts were to be judicially rather than self-administered, mandatory rather than hortatory, they might quickly be found to embody premises fully as demanding and subject to the sensitivities of observers as judicial disqualification provisions have proved to be.

Nor do all the precepts state concerns commonly associated with "conflict of interest" analysis. Independence, impartiality, and public confidence can be or appear to be compromised by behavior having little association with conflicting loyalties or self-serving. Dr. Bingham's speech in the lead pollution case or Chairman Pertschuk's remarks in *ANA* may reasonably be characterized as partisan in some sense; yet neither grew out of any present or past relationship or reflected any personal gain to be achieved. In the usual understanding—reflected in agency practice as shown by the responses to the Conference survey—"conflict of interest" concerns *are* concerns with conflict.[55] Prejudgment and bias, which may also affect impartiality, independence, and public confidence, are understood to be dealt with under another head. In the absence of the distortions arising from associational conflict or selfish motive, partiality raises no conflict of interest concern.

This conclusion, such as it is, is of course strictly analytical. It does not imply either that nonconflictual partiality in rulemaking is licit or that the six Executive Order precepts are inappropriate goals for the public service to seek or even enforce. Those issues are the business of the next section of this Article. What the conclusion does suggest is that development of conflict of interest analysis is not itself the appropriate vehicle for enforcing the precepts on government employees.

III. CONSTRAINTS ON JUDGES: "BIAS" AND "ANIMUS"

Conflict of interest principles represent one of three general groupings of concern about the propriety of participation in a government decision. The other two, prejudgment of fact (bias) and prior or irrational commitment (animus), are commonplace concerns in adjudication for which objectivity in the decisionmaker is central, but are foreign to agency rulemaking practice. With exceptions almost wholly limited to conflicts of interest (broadly conceived) or on-the-record proceedings, federal agencies neither administer nor recognize a need for any system of assessing the propriety of participation in rulemaking or policymaking. Even where the agencies' rules do provide for disqualification of presiding officers in on-the-record rulemaking, that is most often as part of general procedural rules for all on-the-record proceedings, adopted with adjudication in view.[56] Assessing the appropriateness of disqualification for bias or animus in rulemaking requires, first, an appreciation of the adjudication model, against which contrasts may appear. That model itself, it will quickly be seen, is not premised on the hopeless aim of obtaining absolute objectivity in the adjudicator. A less ambitious agenda, of open-mindedness respecting the case-unique aspects of the proceeding, characterizes even judicial disqualification rules. The following pages begin with a discussion of disqualification in strictly judicial proceedings and then discuss the practice in agency proceedings resembling trials before moving to consider the possible applications of this analysis to policymaking.

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[55] Accord, id. at 4-6.

A. *Judicial Disqualification*

The requirements of impartiality commonly accepted as apt for the judicial branch of government stand in marked contrast to those applicable in the legislature or to the general run of executive activity. Personal animus toward parties or prejudgments respecting facts in dispute, irrelevancies for legislators and executive personnel (unless the latter happen to be regarded as quasi-judges), are well established grounds for judicial disqualification.

Two statutes, 28 U.S.C. sections 144 and 455, set the current legislative standards for the federal judiciary. Section 144, dealing with alleged "personal bias or prejudice," is essentially unchanged since its enactment in 1911.[57] Under its provisions, a judge is obliged to disqualify himself on the timely filing of a detailed and sufficient affidavit of "personal bias or prejudice," supported by counsel's certificate of good faith; it was early established that the truth of the matters asserted is not at issue, but only their sufficiency, if true, to establish personal animus or prejudgment.[58] To reduce judge-shopping, counsel is limited to one such affidavit in each case.

Section 455, prior to its recent amendments, dealt exclusively with conflict of interest disqualification. Disqualification for interest, early established at common law,[59] had been required by statute in the Act of May 8, 1792,[60] forbidding the sitting of federal district judges "concerned in interest" or who had been "of counsel for either party." Amendments enacted in 1911 called upon a judge to disqualify himself if he was "concerned in interest" in a case, had been of counsel, had been a material witness, or was "so related to or connected with either party as to render it improper, *in his opinion,* for him to sit."[61] The section's limited statement of principle and highly subjective test led to the conclusion that judges had a "duty to sit," and that in close cases the balance should be tipped toward hearing rather than recusal.[62]

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[56] The APA provision for disqualification in on-the-record proceedings, 5 U.S.C. § 556(b) (1976), governs both rulemaking and adjudication, and suggests disqualification for "personal bias" of both "presiding employees" and "employees participating in decisions in accordance with section 557." The latter reference is apparently to "an employee qualified to preside at hearings" where the presiding employee is unavailable, id. § 557(b), or "one of [the agency's] responsible employees" in rulemaking or initial licensing, id. § 557(b)(1). Since the responsibilities of responsible employees in rulemaking will often have led them into consultations forbidden to those who preside in on-the-record adjudication, id. § 554(d)(1), with results usually described as "personal bias" in settings where such contacts are proscribed, the application of § 556(b) to formal rulemaking can certainly vary from that appropriate for adjudication. No suggestion of such a variation appears in the agency rules, although it may be reflected in some agencies' practice.

[57] 36 Stat. 1090 (1911).

[58] Berger v. United States, 255 U.S. 22 (1921). An example of a dispute over "sufficiency" would be whether the affidavit concerns extrajudicial events, or matters arising during the course of judicial activities. The distorting factors asserted are required to be personal—that is to say, extrajudicial in origin—in the usual case; an affidavit based on the judge's participation in an earlier trial would be regarded as insufficient to establish cause to disqualify.

Constitutional analyses of the requirements of fair procedure were equally limited. The leading Supreme Court cases imported little more than that due process forbade the sitting of a judge who was financially interested, directly[63] or indirectly,[64] in the outcome of a proceeding, or whose prior contacts with a party were so emotionally charged as to make it appear likely that he would now regard a pending action as his own.[65] In part, this reluctance to require disqualification was grounded in important policy concerns. Although expansion of the federal judiciary can ease the technical problems created by disqualification, the costs, complications, and delays involved in providing substitute judges remain substantial. Too ready disqualification invites party efforts at disqualification. And it remains true that if

> "bias" and "[im]partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men

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[59] Dr. Bonham's Case, 8 Co. Rep. 107a, 113b, 77 Eng. Rep. 638, 646 (1610), is the decision most often cited, but one whose principles would not have been surprising to jurists of the time. D. Hewitt, Natural Justice 16 (1972). On the common law development, said to have been limited in early cases to allegations of personal interest, see also Frank, Disqualification of Judges, 56 Yale L.J. 605 (1947); Note, Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience, 48 Ore. L. Rev. 311 (1969); Note, Judicial Disqualification in the Federal Courts, 1978 U. Ill. L.F. 863, 865.

[60] 1 Stat. 278 (1792).

[61] 36 Stat. 1090 (1911) (emphasis added).

[62] Edwards v. United States, 334 F.2d 360 (5th Cir. 1964).

[63] Tumey v. Ohio, 273 U.S. 510 (1927).

[64] Ward v. Village of Monroeville, 409 U.S. 57 (1972).

[65] Withrow v. Larkin, 421 U.S. 35 (1975), for example, reiterates the position that the combination of investigating and judging functions is not in itself a denial of due process. The Court's several criminal contempt disqualification cases, which might have appeared to stand for the contrary view, in fact involve an additional element—the judge is "victim" as well as "prosecutor" and "judge" of the alleged offense, and this status makes the case far more his "own cause," which he is not fit fairly to judge. See, e.g., Taylor v. Hayes, 418 U.S. 488 (1974); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); In re Murchison, 349 U.S. 133 (1955). Similar concerns seem to underlie the dissent in Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976); the majority, following *Withrow,* found no constitutional difficulty in permitting a school board that had conducted negotiations during a teacher's strike to impose sanctions on teachers participating in the strike; the dissenters believed disqualification would be required to achieve constitutional fairness if (as was not clear on the record) the board's own conduct during the strike was in issue in any significant respect. All nine Justices agreed that simple knowledge of the circumstances of the strike, acquired in official capacity but dehors a record, was not disqualifying.

> which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. . . . Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference.
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> . . . Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.[66]

The profession and the public were persuaded, however, to the need for making disqualification standards more explicit by a period of extraordinary turmoil over judicial ethics beginning in the late 1960's.[67] Closely tracking 1972 revisions to the ABA's Canons of Judicial Ethics, Congress greatly enlarged the scope of mandatory judicial disqualification in 1974 amendments to section 455.[68] The new version repudiates any "duty to sit" as a policy concern possibly counterbalancing factors suggestive of recusal. The judge is to consult not his own perception of what factors are disqualifying, but the perception of reasonable members of the community.[69] Concrete examples, not all of them obvious, are given of circumstances in which disqualification is mandatory,[70] reaching issues of animus and prejudgment as well as an expanded domain of personal interest issues. Particularly striking is the statement of nonwaivable grounds for disqualification seeming to arise from prior connections that may have been wholly intellectual in character: "personal knowledge of disputed evidentiary facts concerning the proceeding,"[71] and, for prior government employees, having "expressed an opinion concerning the merits of the particular case in controversy."[72] Both of these legislative statements could be thought to have strong implications for administrative as well as judicial behavior. Closer examination, however, discloses few if any instances of compelled judicial disqualification in the absence of some species of interest in the outcome or personal animus toward a party.

The only explanation of the "personal knowledge" clause is that "a judge cannot be, or cannot appear to be, impartial if he has personal knowledge of evidentiary facts that are in dispute."[73] Plainly that statement is overbroad. Judges read newspapers, and do not withdraw whenever the credibility of friends or acquaintances may be put at issue, or when in daily life they may have had the chance to form an impression about some matter necessary to decide—for example, the level of noise pollution created by an airport at which the judge has sometimes lunched. Discussion in and out of the cases uniformly refuses to find a need for disqualification in such circumstances.[74] Cases identified in the most extensive treatise treatment as supporting the "personal knowledge" proposition all involve situations in which prior, ex parte contacts had been made by one party to the case, thus creating an appearance of favoritism, bias, or prejudice, as well as "prejudgment."[75] No case yet found holds that simple exposure to controversy in the community, without more, is enough.

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[66] In re J.P. Linahan, Inc., 138 F.2d 650, 651-52 (2d Cir. 1943) (Frank, J.).

[67] A Supreme Court Justice had been denied the Chief Justiceship and then resigned under pressure; two Supreme Court appointments had failed of confirmation; another Justice had been threatened with impeachment; yet another was sitting in judgment over disputes involving the United States on which he seemed to have expressed views while acting as an Assistant Attorney General. Scandals and partiality at lower levels of the judiciary were also in the news. The story is well told in J. MacKenzie, The Appearance of Justice (1974).

[68] Pub. L. No. 93-512, 88 Stat. 1609 (1974).

[69] 28 U.S.C. § 455(a) (1976): "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." What would be "reasonable" questioning is itself a matter in some dispute. See Note, supra note 59, 48 Ore. L. Rev. at 311; Note, Disqualification of Federal Judges for Bias or Prejudice, 46 U. Chi. L. Rev. 236 (1978).

[70] 28 U.S.C. § 455(1) (1976).

[71] Id. § 455(b)(1).

[72] Id. § 455(b)(3).

A well settled and important narrowing of the statute's language is that knowledge previously acquired in a judicial capacity is not "personal" knowledge.[76] Of course such official knowledge of the facts may be equally conducive to prejudgment or, where a party is abrasive, animus. Judges make preliminary determinations before trial that inevitably shape their view of the facts to be proved—in criminal cases (e.g., probable cause hearings) as well as during civil discovery and pretrial conference; in ex parte (on applications for warrants and temporary restraining orders) as well as in bilateral proceedings. They try again cases in which they have been reversed on appeal; pass on motions for postconviction relief or parole revocation in cases in which they earlier convicted the party in crime. But these prejudgments are not disqualifying, as *United States v. Wolfson*[77] illustrates. Wolfson wished to disqualify District Judge Palmieri from passing on his application for postconviction relief. Wolfson had twice been a defendant before the judge, had unpleasant exchanges with him during and after the trials, and subsequently sent him unfriendly communications. The circumstances did not suffice to disqualify the judge. Personal bias, the Second Circuit stated, "must stem from an extra-judicial source";[78] the letter and telegram Wolfson had sent may have shown his feelings toward the judge, but not the reverse.

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[73] Thode, Reporter's Notes to Code of Judicial Conduct 62 (1973) [hereinafter cited as Thode, Reporter's Notes]. Professor Thode was reporter to the ABA's special committee, and his work is widely regarded as important "legislative history" of the Code. Compare Rehnquist, Sense and Nonsense About Judicial Ethics, 28 The Record 694 (1973).

[74] "The disqualification provision is directed toward knowledge of disputed evidentiary facts, that is, matters underlying the cause of action. We do not understand the statutory language to be directed toward routine judgments of credibility. . . . Congress did not intend to disrupt the court's business on such inadequate grounds." Plechner v. Widener College, 569 F.2d 1250, 1263 (3d Cir. 1977); see also United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); Parrish v. Board of Comm'rs of Ala. State Bar, 524 F.2d 98, 104 (5th Cir. 1975) ("Credibility choices are not disputed facts."); United States v. Conforte, 457 F. Supp. 641 (D. Nev. 1978) (judge would have to have disqualified self if a juror); Town of E. Haven v. Eastern Air Lines, 304 F. Supp. 1223 (D. Conn. 1969).

In Commonwealth v. Perry, 468 Pa. 515, 364 A.2d 312 (1976), a trial judge who had been friendly with a murdered policeman and attended his funeral was held not to have violated canon 3C(1) by presiding at the resulting homicide trial. While one may believe here, with Professor Thode, The Code of Judicial Conduct—The First Five Years in the Courts, 1977 Utah L. Rev. 395, 402-03 [hereinafter cited as Thode, Code of Judicial Conduct], that the dissent in the case has more merit, surely that is because the threat of partiality has crept in along with that of prior exposure to "fact." As in the criminal contempt cases, see note 65 supra, there is reason to fear the case has become the judge's own. Putting critical reaction aside, however, the fact of this decision confirms the test: "personal knowledge of the facts" may refer to what is known by a potential material witness, or what results from inappropriate contact by a party (suggestive of favoritism); it does not refer merely to acquaintance with versions of the facts acquired through ordinary life in the community.

[75] 13 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3543 (1975).

[76] The cases are collected and discussed at id. § 3542 nn. 10-14. An excellent, illustrative, and frequently cited example is In re Fed. Facilities Realty Trust, 140 F. Supp. 522 (N.D. Ill. 1956). See United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). At some point a reviewing court may be convinced that the trial court has become so emotionally involved with one side or the other as to foreclose necessary detachment. See, e.g., Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979); Reserve Mining Co. v. Lord, 529 F. 2d 181 (8th Cir. 1976). Such cases seem to be characterized by intemperance of expression toward one side or by evident emotionality beyond simple disbelief, and expressions in the opinions make one suspect that the reviewing judges believe the sitting judge to be often unjudicial in mien. They may also be cases involving the need to administer a remedy, or other circumstances that force the judge to deal with the parties and assess their good faith over relatively long periods of time. Once a judge is drawn to question the good faith of a party he has, of necessity, failed to remain "detached from the conflict between the parties." Id. at 186. See generally Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 53-56 (1979).

At one level, the refusal to find prior judicial exposure disqualifying represents an accommodation to the needs of a busy judicial system; at another, a safeguard against the manipulation that could occur if a defendant—or any party who began to see the wind blowing against him—could secure recusal by outrageous behavior or by pointing out the judgment in the process of formation. "If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."[79] Equally important, however, is the perception that these prejudgments, officially rather than "personally" reached, do not compromise the deciding officer. Because *these* judgments are professional ones, they are thought not to produce or threaten the same level of psychological commitment to outcome as would more personal involvements. The judges may be "assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."[80]

Knowledge of "disputed evidentiary facts" refers not only to knowledge acquired in a certain way, but also to "facts" of a directly testimonial and case-unique character. We have already suggested the distinction between the questions whether Jones was fired on account of race, and whether segregated education is harmful to the development of children. The latter question *does* raise factual issues, issues on which testimony and dispute can readily be imagined; but no particular observable events are uniquely central to that testimony, and resolution of those issues has a significance stretching well beyond the particular case in which they may be presented. The use of judicial notice, of "factual" advocacy based on materials never placed on record at a trial, has long been tolerated, and no case suggests that disqualification would be appropriate when it has occurred.[81] Thus, it is not sufficient that a given matter is susceptible of evidentiary dispute; prior exposure to "facts" has seemed important to disqualification in the judicial context only where the facts in question are unique to the parties, requiring, not merely permitting, testimony for their elucidation and resolution.

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[77] 558 F.2d 59 (2d. Cir. 1977); accord, In re Int'l Bus. Machines Corp., 618 F.2d 923 (1980).

[78] 558 F.2d at 62.

[79] In re J.P. Linahan, Inc., 138 F.2d 650, 654 (2d Cir. 1943).

[80] United States v. Morgan, 313 U.S. 409, 421 (1941). See Withrow v. Larkin, 421 U.S. 35 (1975).

The distinction thus suggested is essentially Professor Davis's oft-referred-to distinction between "legislative" and "adjudicative" fact. While, prior to the decision in *ANA*, no court or legislature seems to have referred to it in discussing judicial disqualification, the distinction was central to consideration of the closely related issue of judicial notice.[82] Rule 201 of the Federal Rules of Evidence now places constraints on the use of judicial notice—in other words, *requires* trial—only for matters of "adjudicative fact" as Professor Davis has defined them—"the facts of the particular case," those "which relate to the parties," as distinct from those "which have relevance to legal reasoning and the lawmaking process," such as whether adverse testimony given in criminal proceedings by one spouse against another would be likely to destroy almost any marriage.[83] If the dispute is one readily submitted, in our traditions, to legislative resolution, then the underlying factual questions do not come within the reach of the formal constraints on judicial notice established by rule 201, however possible or even desirable it may be to resolve that dispute when it arises in a trial by evidence subject to cross-examination.[84] Nor, so far as can be determined, have such factual disputes ever been the occasion for disqualification of a judge found to have "personal knowledge" of them.

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[81] Accord, Note, Bias in Administrative Rulemaking After *Association of National Advertisers v. FTC*, 54 Notre Dame Law. 886, 895-98 (1979); but compare *ANA*, slip op. at 34-35 n.11 (MacKinnon, J., dissenting).

[82] Judicial notice rules, like ex parte contact rules and disqualification rules in the context here under discussion, are concerned with how judges acquire information, the necessary relation of the parties to that process, and the control by the parties of it. Rules respecting judicial notice and ex parte contact, however, usually provide a much milder remedy (notice and opportunity to respond) than bias rules, for which the remedy is disqualification. See, e.g., J. Weinstein & M. Berger, Weinstein's Evidence 200-18 (1979). Only in extreme cases are ex parte contacts apparently thought to require disqualification as a remedy; no judicial notice error has been found which led a court to impose that sanction on the noticing judge. Cf. Fox v. City of W. Palm Beach, 383 F.2d 189 (5th Cir. 1967) (judge noticed highly disputable facts about land character on the basis of prior personal ownership of similar land; reversed for retrial, apparently before same judge). In the absence of a personal stake, it appears to be assumed that the judge, informed of his error, will be fully capable of an impartial retrial. If taking judicial notice of a given fact is not error—or if error, is readily corrected by affording an opportunity for responsive demonstration—having "personal knowledge" of the same material can hardly be, without more, sufficient ground for the more extreme step of disqualification.

[83] See Advisory Committee's Note to Fed. R. Evid. 201(a).

[84] The distinction between adjudicative and legislative facts is not, as litigators sometimes assert it to be, one between matters susceptible of evidentiary proof at a trial and those that are not. One can imagine experts testifying richly about the impact of spousal testimony on marriage survival, and vigorous cross-examination of them respecting their views and the experimental basis on which they rest. Nor do the comments on rule 201 deny that a judge required to decide some controverted issue of legislative fact may sometimes find it advisable to use the medium of trial-type procedure. Unconstrained judicial notice is not always desirable for "legislative facts." But those who drafted rule 201 were unable to formulate a general principle that would not be too constraining on judicial disposition of these more general issues, issues not unique to the parties and to the particular circumstances of the litigation. Compare the discussion of similar difficulties in connection with Congress's adoption of the Magnuson-Moss Act in the majority's opinion in the *ANA* case, slip op. at

Disqualification of judges for their views of policy or law presents far simpler issues; the law unequivocally regards attitudes on legal or policy issues as lying outside the perimeters of concern with bias or prejudgement.[85] The statute, like the ABA canons on which it draws, speaks only of interest, attitude toward a party, or extrajudicial knowledge of the "disputed evidentiary facts" as grounds for disqualification.[86] Although reserve in public commentary about pending proceedings is called for in ABA canon 3A(6), that canon is limited to the particulars of the case, and violation of it is not disqualifying. As Justice Rehnquist remarked in a notable memorandum explaining a refusal to disqualify himself in *Laird v. Tatum,*

> Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of

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23-25. The majority concludes that there may be a third class of fact—"specific fact"—narrow in focus and material to the outcome of rulemaking, yet "legislative" in character, which it is reasonable to find using trial-type techniques. Its principal reliance is on legislative history deriving from the Administrative Conference and its officers.

Rather than view the distinction from the perspective of what may be litigated one could approach it from the perspective of what can be legislated. That is, one could say that an adjudicative fact is one that, in our traditions, cannot be fairly resolved contrary to private interest by a legislature but *requires* a trial; is one that, in appropriate circumstances, would excite bill of attainder concerns; or is one as to which, in Professor Davis's terms, we have made "the practical judgment on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the *best* way to resolve controversies . . . ." K. Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives on Law 69, 93 (1964) (emphasis added).

[85] While this outcome is not beyond intellectual question, see Downing, Judicial Ethics and the Political Role of Courts, 35 L. & Contemp. Prob. 94 (1970), no one has yet suggested a practical alternative.

[86]

> Subsection (a) has gone through several formulations in drafting. At one time the language provided for disqualification if a judge "had a fixed belief concerning the merits." It was intended that a judge disqualify himself if he had made up his mind on the merits before he heard the case. The Committee was confronted, however, by the interpretation of many able judges and law professors that would require a judge to disqualify himself if he had a fixed belief about the law applicable to a given case. For example, it was argued that a judge with a fixed belief that the First Amendment precludes a libel action by a public official against a newspaper in the absence of proof of malice should disqualify himself in a libel case of that general character. This interpretation was not intended; indeed, the Committee recognized the necessity and the value of judges' having fixed beliefs about constitutional principles and many other facets of the law. As a result of the apparent ambiguity of the proposed language, the Committee adopted instead the standard of "personal bias or prejudice."

Thode, Reporter's Notes, supra note 73, at 61.

> constitutional adjudication would be evidence of lack of qualification, not lack of bias.[87]

The circumstances of this case are instructive. While an Assistant Attorney General, the Justice had appeared before Senate committees as a witness on the legal issues involved in the case, and had twice had to refer to the case itself—then pending in lower courts—although in respects not at issue before the Supreme Court. In adopting section 455, Congress revised the ABA canon in a way that might seem a direct response to Justice Rehnquist's refusal to withdraw. A former government attorney must disqualify himself, it provided, not only when he has acted as counsel, adviser, or material witness in the case, but also where he has ''expressed an opinion concerning the merits of the particular case in controversy.''[88] This might be thought a repudiation of the established view, making a judge's expression of policy or legal views during a prior period of government service a ground for disqualification.

No such intent is expressed by the legislative history, however; it refers to Justice Rehnquist's memorandum but gives no indication whether he is thought to have been right or wrong in his decision to participate. A close analysis of the problem of disqualification of former government attorneys, relied on in part by Justice Rehnquist, reached the historical conclusion that ''Justices disqualify in government cases when they have been directly involved in some fashion in the particular matter, and not otherwise . . . [and] do not disqualify merely because the particular matter involves a policy which, when in the government, they may have helped to form.''[89] The language of section 455 is consistent with this practice, if ''the merits of the particular case'' is understood to refer to the outcome of the case between the parties, on its unique facts, and not to the outcome of any legal questions involved. The ethical ill to which the subsection is addressed appears to be one of animus rather than intellectual predisposition—that the judge has committed himself personally to one of the contending parties, rather than that he has views about the appropriate rule of law to be applied. So viewed, the statute adopts a rule comparable to that which precludes a judge from participating in appellate review of his own trial decisions, but permits him to review other cases involving identical legal or policy issues. The application of this provision to Justice Rehnquist's sitting in *Laird v. Tatum* is at best controversial;[90] but prior general legal or policy views remain firmly nondisqualifying.

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[87] Laird v. Tatum, 409 U.S. 824, 835-39 (1972). Justice Rehnquist also reviews at length the history of practice by Supreme Court Justices, a history in which labor partisan Frankfurter did not hesitate to sit on cases involving disputes over the meaning of the Norris-LaGuardia Act, which he helped to draft; and former Senator Black sat to assess the constitutionality of legislation he had championed in the Senate.

[88] 28 U.S.C. § 455(b)(3) (1976).

[89] Frank, Disqualification of Judges: In Support of the Bayh Bill, 35 L. & Contemp. Prob. 43, 50 (1970).

[90] In their treatise on federal civil procedure, supra note 75, Professors Wright, Miller, and Cooper at first concluded that this must be disqualifying; they subsequently recanted that view, remarking that the Justice's testimony, as relevant to the issues before the Court, dealt only with general propositions of law. Compare id. § 3544 n.7 with id. (Supp. 1980). But see Thode, Code of Judicial Conduct, supra note 74, at 403 n.36.

B. *Administrative Disqualification in On-The-Record Proceedings*

1. *Statutory Provisions*. The Administrative Procedure Act provides that in any on-the-record proceeding:

> A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.[91]

This language does not embody the detailed provisions of 28 U.S.C. section 455, although they may be looked to for guidance. As important for present purposes, what may be disqualifying is limited by the implications of the Act's more specific provisions respecting internal separation of functions.[92] These provisions limit the kinds of conversations agency decisionmakers may have with fellow employees in on-the-record proceedings, limitations equally concerned with preserving the conditions necessary for objective decisionmaking. But these provisions are strikingly limited in their application. ''An employee or agent engaged in the performance of investigative . . . functions'' *may* ''participate or advise in the decision'' of an on-the-record rulemaking, initial licensing, or ratemaking. To this extent, prior associations that today would plainly be regarded as disqualifying in a judicial context are not made disqualifying in on-the-record rulemaking, licensing, or ratemaking.[93] For agency members themselves, disqualification is apparently never required for prior performance of official functions that a judge might regard as inconsistent with their agency role.

The legislative history of the APA provisions strongly suggests that the drafters' concerns were with the personal animosities and commitments arising from an investigator's or prosecutor's active pursuit of a particular adversary, and not with intellectual commitments arising out of prior consideration of an asserted fact. Thus, in discussing the need for separation of adjudicatory function from investigating and prosecuting, the Final Report of the Attorney General's Committee carefully draws a line between those who actually investigate and prosecute and those who make the intellectual assessment whether on a given set of asserted facts a prosecution should be brought. The former suffers the ''personal psychological'' disqualification of having so ''buried himself in one side of an issue [that he is] disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands''; the latter—generally including the agency head—need make no such commitment to the asserted facts.[94] The reports in both houses of Congress refer to "accusatory" proceedings as the ones for which this separation of functions is required.[95] Perhaps most telling in this respect is the discussion in the Attorney General's Manual on the APA,[96] which identifies the presence of "accusatory or disciplinary factors" as a necessary condition of applying the separation of functions requirement. The "personal psychological" commitment of investigators or prosecutors vis-à-vis particular individuals would not, in the Attorney General's view, disqualify them from assisting in the decision of cases involving other persons "merely because the facts of [the latter case] may form a pattern similar to those which they had heretofore investigated or prosecuted"; identity of parties was the disqualifying element.[97] Although a general counsel could not fairly advise the agency how to decide an accusatory proceeding in which he had been substantially involved, his "participation in rule making and in court litigation would be entirely compatible with his role in advising the agency in the decision of adjudicatory cases."[98] Actual commitment to one side in a particular accusatory or disciplinary battle, not simple exposure to factual materials, thus appears to have been the principal concern.[99]

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[91] 5 U.S.C. § 556(b) (1976).

[92] Id. § 554(d).

[93] Regulatory reform proposals pending before Congress would eliminate this distinction. See S. 262, 96th Cong., 1st Sess.; S. 2147, 96th Cong., 1st Sess.; H.R. 3263, 96th Cong., 1st Sess. At this point, however, the purpose is not so much to defend the distinction, which is widely regarded as unfair for proceedings required to be decided on the record, as to illustrate by resort to existing legal doctrine what has been the agreement on application of disqualification principles to administrative practice. The pending proposals would *not* apply to informal ratemakings. See also note 19 supra, discussing recent changes made by the FTC Improvements Act of 1980.

2. *The Supreme Court Cases.* The decisions of the Supreme Court, some already briefly discussed,[100] suggest that even in accusatory proceedings, involving specific parties and directed to the imposition of a sanction, mandatory dis-

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[94] S. Doc. 8, 77th Cong., 1st Sess. 56-57 (1941). Practical considerations also are important: the individuals who actually investigate and prosecute can be separated from the decisional function without significant impairment of efficiency. But policy decisions respecting the initiation of actions cannot readily be separated from assessing the results of those actions.

[95] Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 24-25 (1946); S. Rep. No. 752, 79th Cong., 1st Sess. 18 (1945) (agencies are advised not to apply the exceptions in ratemaking or licensing cases that prove to be "accusatory in form and involve sharply controverted factual issues," for the exceptions are not meant to preclude "fair procedure where it is required"); H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946). The Senate Judiciary Committee print would specifically have required disqualification where there had been a willful breach of separation of functions by a hearing officer, but that provision did not emerge from committee. S. Doc. No. 248, 79th Cong., 2d Sess. 29 (1946) at 29.

[96] U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 51-58 (1947).

[97] Id. at 54 n.6. See also Jonal Corp. v. District of Columbia, 533 F.2d 1192 (D.C. Cir. 1976), cert. denied, 429 U.S. 825 (1976).

[98] Attorney General's Manual, supra note 96, at 58 n.8. Cf. American Gen. Ins. Co. v. FTC, 589 F.2d 462 (9th Cir. 1979), in which Commissioner Collier was disqualified in the Commission's proceeding against American General for having previously served as counsel in a related court of appeals proceeding. Had he previously appeared as an advocate before the Commission in the case, his disqualification would have been required by uniform judicial practice, § 455, and prior decisions, e.g., Trans World Airlines v. CAB, 254 F.2d 90 (D.C. Cir. 1958). But the appearance here was on review of the Commission's judgment; as the Commission's attorney, Collier was bound to take no position other than its own; if he thus became "committed" to a particular outcome, it is hard to understand why his commitment should be regarded as greater or more prejudicial than that of the commissioners whose judgment he defended. Those commissioners, of course, remained free to decide the issue. This line of analysis was not discussed by the court.

[99] There appears to have been no direct consideration of what was meant by disqualifying bias, it presumably being understood that prevailing judicial norms would be applied. These were permissive, as has already been remarked. See, e.g., NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947).

[100] See text accompanying notes 63-65 supra.

qualification requires a distinctly personal interest (whether financial or emotional) in the outcome of the particular case. When the Secretary of Agriculture reacted with strong emotion to Supreme Court decisions adverse to him in the famous *Morgan* litigation,[101] the fact "that he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duties in subsequent proceedings ordered by this Court."[102] The views expressed had neither impugned the parties nor concerned any particular facts he had to decide respecting them.

Similarly, in a proceeding seeking to impose the sanction of a cease and desist order, it was not disqualifying that members of the FTC had engaged in an ex parte study of the very practices engaged in by the defendants in the proceeding and had reported to Congress their view that the practices were in violation of the law. The case, *FTC v. Cement Institute,*[103] is frequently discussed as if it involved precommitments of a policy nature only, but the Court assumed that those views were based on the investigation's results—i.e., on prior exposure to fact. "[T]hat the Commission had entertained such views . . . did not necessarily mean that the minds of its members were irrevocably closed . . . ." The prior exposure was official and unrelated to any particular party or case—of a piece with Congress's purpose to permit commissioners " 'to acquire the expertness in dealing with these special questions concerning industry that comes from experience.' "[104] To be contrasted was the decision in *Tumey v. Ohio,*[105] where there had been a "direct, personal, substantial, pecuniary interest in reaching his conclusion to convict."[106]

The absence of a "personal psychological" commitment, as distinct from a commitment ascribable to the performance of official function, was also central to the Court's refusal to find disqualifying bias in *Withrow v. Larkin.*[107] That case involved a state medical board responsible both for selecting professional discipline cases for prosecution and for deciding those not referred to criminal prosecution. This combination of functions, it was argued, offended constitutional requirements of fair procedure. The Court rejected the argument. It identified "cases . . . in which the adjudicator has a pecuniary interest . . . and in which he has been the target of personal abuse or criticism from the party before him" as presenting too high a probability of actual bias to be constitutionally tolerable. But it concluded that "a realistic appraisal of psychological tendencies and human weakness" did not require the same conclusion for the combination of investigative with adjudicatory function; the prior exposure to adjudicatory fact which follows from that combination did not imply an incapacity for objectivity on the record.[108]

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[101] United States v. Morgan, 313 U.S. 409 (1941).

[102] Id. at 421.

> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

Id.

[103] 333 U.S. 683, 700-03 (1948).

[104] Id. at 702 (citing Report of Comm. on Interstate Commerce No. 597, 63d Cong., 2d Sess. 10-11 (1914)).

[105] 273 U.S. 510 (1927).

[106] The Court also relied upon the absurdity that would result from disqualification of the entire Commission—in effect, the doctrine of necessity. It may be noted, however, that this concern was expressed as only an alternative ground of decision, and that "necessity" has not prevented the Court from disqualifying an entire tribunal where substantial personal interests of its members so require. Id.; Gibson v. Berryhill, 411 U.S. 564 (1973).

[107] 421 U.S. 35 (1975). See note 65 supra.

The distinction parallels that already encountered for judicial disqualification between prior personal (extrajudicial) contact with a case and prior official contact. Where the decider has acted officially, he is presumed to be able to overcome his prior inclinations, knowledge, or conclusions; it is prior personal involvement that produces irrational attachment to the possibly erroneous first view. This presumption of objectivity when acting in role can be defeated in particular cases by demonstrating actual irrationality in behavior. But the line between what is learned in role and what is learned outside of role is nonetheless a major reference point.

Like many hypotheses about the rich complexities of human behavior this one is more the product of practical necessity and historical acceptance than rigorous scientific demonstration. Doubtless a criminal defendant ordered to trial again before the judge whose verdict he has just had reversed on appeal worries that his burden may be greater now than it previously was, and so it may be. But the community's resources are limited; for centuries judges have been retrying cases, and passing on the presence of both prima facie showings and proof of guilt, without notable outcry or demonstration of unfairness; to eliminate these practices would make public administration more costly and cumbersome. Moreover, the judges who have to decide these issues perceive in themselves and in centuries of professional tradition a capacity in fact to learn from and surmount demonstrations of past error, and to maintain a "professional" attitude toward matters put before them. These perceptions could be challenged, but they persist and are supported by history and widespread judicial confidence. They are also readily ascribed to administrators performing similar functions. Moreover, in both contexts, the practical advantages of belief in them are substantial.

For administrators, roles are far less confined than they are for judges, and so the sweep of what may be learned and the possible opportunities for a prejudgment may seem greater, even when the administrator acts entirely within role. Yet the Supreme Court does not appear to have concluded that only those official functions *that would also be performed by a judge consistent with judi-*

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[108] The Court remarked, in distinguishing In re Murchison, 349 U.S. 133 (1955), that it was of course possible that unacceptable risks of bias might "lurk in the way particular procedures actually work in practice." The issue of concern on that analysis, however, would be the same as that identified in the text—whether the circumstances shown were so likely to produce a personal psychological attachment to a particular outcome as to defeat the assumption that the officers are " 'men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' " 421 U.S. at 55, quoting United States v. Morgan, 313 U.S. 409, 421 (1941).

cial duty are consistent with fairness in adjudicative activities. Judges do not make ex parte investigations and report to Congress, as did the Commissioners in *Cement Institute*; nor do they initiate the filing of charges, as did the Board in *Withrow*. Indeed, the Court in *Withrow* indicated its approval of *Pangburn v. CAB*, a First Circuit decision finding no constitutional unfairness in the CAB's both performing a ''Congressional mandate to investigate and report the probable cause of all civil air accidents'' for a recent accident and subsequently hearing a disciplinary proceeding against a pilot involved in that accident, whose conduct the report had criticized.[109] The Court simultaneously withheld its approval of some lower court holdings that had found due process violations, apparently in reliance on the judicial analogy.[110]

3. *The Court of Appeals Cases.* The court of appeals opinions on agency disqualification in on-the-record adjudications have been generally consistent in result if not always in expression, with the distinction between ''personal psychological'' influences and judgments reached or expressed in the course of official business.[111] Quite naturally, however, the courts of appeals have often been more deeply involved in the particular facts of the cases before them. Three cases in particular, all influential, convey a tone very different from the Supreme Court cases.

Two of the cases, *Texaco, Inc. v. FTC* [112] and *Cinderella Career & Finishing Schools, Inc. v. FTC*,[113] arose out of speeches made by FTC Chairman Paul Rand Dixon during the pendency of adjudication. In each case, the speech was interpreted by a party and the courts as indicating that the Chairman had made up his mind in advance of decision, and therefore must be disqualified. No prior unofficial connection with the cases, interest, animus, or other ''personal psychological'' commitment appears to have been shown. So far as appears, it is merely that while the cases were pending on the docket and not decided, Chairman Dixon spoke about them in a way that conveyed the impression that he had made up his mind. The court in both cases expressed as the test for disqualification whether '' 'a disinterested observer may conclude that [the Commissioner] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.' ''[114]

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[109] 421 U.S. at 50-51 n.16, quoting Pangburn v. CAB, 311 F.2d 349, 358 (1st Cir. 1962).

[110] 421 U.S. at 50-51 n.16.

[111] Thus, Chairman Dixon of the FTC was disqualified in American Cyanamid v. FTC, 363 F.2d 757 (6th Cir. 1966), on account of his prior active service as counsel to an aggressive Senate subcommittee concerned with the same facts and issues. But compare Safeway Stores, Inc. v. FTC, 366 F.2d 795, 801-02 (9th Cir. 1966). Commissioners of the SEC and the CAB were disqualified on the basis of their advocacy roles prior to becoming commissioners in Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962), and Trans World Airlines v. CAB, 254 F.2d 90 (D.C. Cir. 1958), respectively. But FTC and CAB commissioners who *as commissioners* pursued investigations to develop, and reached conclusions about, facts later put at issue in sanction-seeking adjudication were not disqualified. FTC v. Cement Inst., 333 U.S. 683 (1948); Pangburn v. CAB, 311 F.2d 349, 358 (1st Cir. 1962). Compare the discussion of ''structural'' as opposed to ''individual'' prejudgment in Porter County Chapter v. NRC, 606 F.2d 1363, 1370-72 (D.C. Cir. 1979).

[112] 336 F.2d 754 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965).

[113] 425 F.2d 583 (D.C. Cir. 1970).

[114] 336 F.2d at 760; 425 F.2d at 591. Both courts cited for this formulation Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896 (1959). But in that case

A striking characteristic of both opinions is that the conclusion drawn by the court—that Chairman Dixon was addressing the merits of particular cases in his speeches—is not an obvious one. *Cinderella,* for example, concerned an FTC fraud action against a vocational school alleged to have falsely promised training that would lead to jobs as airline hostesses. The school's complaint arose from Chairman Dixon's address to a convention of newspaper publishers, seeking to build understanding and support for Commission policy—a responsibility common to commissioners but foreign to judges. As one familiar with wide varieties of consumer fraud, he called on the publishers to exercise some vigor in screening advertisements for possible fraud and gave a series of examples of what he had in mind—a merchant's periodic "going out of business" sale, offering college educations in five weeks or fortunes from raising mushrooms in the basement, eliminating pimples with a magic lotion, becoming a stewardess by attending charm school.[115] Dixon did not mention the Cinderella Career and Finishing School or any particular facts of their case that might have shown whether it did or did not make fraudulent claims. To this writer it is not surprising that after a few years on the job, an FTC commissioner could regard any of the stated claims as prima facie evidence of consumer fraud, an attitude that would not be disqualifying so long as the commissioner remained able to decide whether a particular defendant had in fact made such claims. But to the court, this speech marked Dixon as "insensitive," a man of "questionable discretion and very poor judgment," and led it to disqualify him.[116] In the *Texaco* case, too, Chairman Dixon's words were less conclusive of factual prejudgment than is often assumed.[117]

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disqualification was refused; the language appears there merely as part of precatory advice to the Commission that to preserve its "reputation for objectivity and impartiality" it should write press releases about pending cases in a restrained manner.

[115] 425 F.2d at 589-590. The court regarded the college and charm school claims as references to Cinderella.

[116]

> It is appalling to witness such insensitivity to the requirements of due process; it is even more remarkable to find ourselves once again confronted with a situation in which Mr. Dixon, pouncing on the most convenient victim, has determined either to distort the holdings in the cited cases beyond all reasonable interpretation or to ignore them altogether. We are constrained to this harshness of language because of Mr. Dixon's flagrant disregard of prior decisions.

425 F.2d at 590-91.

[117] In *Texaco,* Chairman Dixon spoke to the National Congress of Petroleum Retailers after the Commission had finally decided charges of price fixing, price discrimination, and overriding commissions brought against a number of firms supplying gasoline and accessory parts to the dealers; a case against Texaco and Goodrich remained pending, however, in light of an earlier remand. Chairman Dixon said:

> We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases.
>
> You know the practices—price fixing, price discrimination, and overriding commissions on TBA.
>
> You know the companies—Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone.
>
> . . . .
>
> Some of these cases are still pending before the Commission; some have been decided by the Commission and are in the courts on appeal. You may be sure that the

One might explain these results as the product of Dixon's strong personality,[118] or perceptions by the court that he had been unresponsive to its concerns.[119] More broadly, it could be suggested that much of the law of bias and disqualification involves the enforcement of rules of decorum, the disciplining of verbal ruffians more than the attainment of actual objectivity in factfinders. Of course judges know that an administrator's repeated exposure to challenged commercial conduct will give him strong ideas about what types are fraudulent—often well in advance of decision in a particular case.[120] They know, too, that the official functions of administrators, unlike judges, include keeping the public and the legislature informed of what they are doing and the policies they are enforcing. In the context of administrative sanctioning, however, vigorous public statement of these ideas or pursuit of these functions threatens common understandings of fairness. Judges do not decide to bring prosecutions, give luncheon speeches, testify to Congress, or issue press releases. The judicial nerve *may* be set on a hair-trigger by the fact that adminis-

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> Commission will continue and, to the extent that increased funds and efficiency permit, will increase its efforts to promote fair competition in your industry.

336 F.2d at 759. The Commission had already settled the policy issues, and had already determined what the practices of some of the companies named were and that those practices were in violation of the law. One *need* not read this statement to say more than that the Commission has found certain practices to be illegal in a series of cases; some cases, however, remain to be decided. The court found in it a promise to convict Texaco—not only if its practices proved to be the same (which could hardly have been objectionable), but in any event.

Judge Washington, concurring, recognized this problem, but believed the mention of Texaco *by name* (an element missing in *Cinderella*) would make it appear to a disinterested observer that Chairman Dixon had in fact prejudged its particular guilt. Once having publicly made a statement "*apparently* inconsistent with an ability to judge the facts fairly," 336 F.2d at 764 (emphasis added), the Commissioner could not restore his capacity to sit by protesting his openmindedness. The question is one of appearances, not actualities; and in Judge Washington's eyes, at least, that appearance arose from Chairman Dixon's choice of forum as much as his words. See Note, Administrative Law, Restraint of Trade, 78 Harv. L. Rev. 658 (1965).

[118] One impartial observer, noting the repeated appearance of Chairman Dixon in these cases, explains them as the product of an unjustified "degree of personal involvement manifested by Dixon. That the result in these two cases depended so much on [his] personality . . . can be seen from other cases in which a reviewing court was not prepared to assume that prior public statements of an official would preclude him from carrying out his public duty." G. Flick, Natural Justice 128, 129 & n.68 (1979), citing *Cement Institute*; National Lawyers Guild v. Brownell, 225 F.2d 552 (D.C. Cir. 1955); and Skelly Oil Co. v. Federal Power Comm'n, 375 F.2d 6 (10th Cir. 1967), modified on other grounds sub nom. Permian Basin Area Rate Cases, 390 U.S. 747 (1968). Kennecott Copper Co. v. FTC, 467 F.2d 67 (10th Cir. 1972), might also have been cited.

[119] The *Cinderella* opinion marked the second effort by the defendant in the Commission action to raise prejudgment issues. The first had been brought on account of a Commission press release alerting the public to Cinderella's "suspected violations" of the FTC Act; on March 12, 1968, the court of appeals upheld the Commission, specifically remarking on the factual (not inflammatory) character of the press release and its recognition that guilt had not yet been established. FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968). Chairman Dixon's speech, the *Cinderella II* court rather pointedly notes, was made just three days later. It must have seemed to the court as if he were deliberately flouting the balance it had sought to achieve between the administrative practice (unusual to a judge) and the demands of fairness.

[120] When judges have disqualified other judges for excessive commitment, it has often been in such terms as "A judge best serves the administration of justice by remaining detached from the conflict between the parties." Reserve Mining Co. v. Lord, 529 F.2d 181, 186 (8th Cir. 1976). One cannot easily substitute "administrator" for "judge" in that sentence, especially regarding policies or disputes that must be managed over time.

trators combine these functions; the perceived potential for abuse and onesidedness may dispose some judges to find factual, personal incapacity to adjudicate in blunt talk alone, wholly in the absence of outside, unofficial, or irrational influence.

However one may react to these speculations, it is apparent that the *Texaco-Cinderella* formulation does not fairly capture the ruling cases.[121] It is far too broad. In *Cement Institute*, in *Pangburn*, and in *Withrow*, the agency had ''in some measure adjudged the facts as well as the law.'' Perhaps one could argue that in *Cement Institute* the facts adjudged were legislative rather than adjudicative in character—that no particular judgment about the behavior of any specific party was made;[122] but the prejudged facts of *Pangburn* and *Withrow* plainly were case- and party-unique. What was missing from those cases but present in Chairman Dixon's speeches (at least in the eyes of the reviewing courts), was the irrational aggressiveness of personal commitment, a commitment making level-headed second thoughts appear too remote a possibility for fairness. Commitment, rather than exposure to facts or the exercise of judgment respecting them, appears in fact to have been the key.

The third of the influential court of appeals cases, *Pillsbury v. FTC*,[123] also involved an FTC chairman—in this instance Chairman Howrey—and the spectre of personal commitment. Chairman Howrey had been called before a Senate committee to answer questions about FTC policy in interpreting section 7 of the Clayton Act[124]—a common enough occurrence, and clearly part of his official function. The Senators' questioning forcefully and repeatedly criticized an interlocutory legal conclusion the Commission had earlier reached in an adjudication involving Pillsbury pending before an FTC hearing examiner at the time of the Senate hearings. The Senators favored an approach more adverse to Pillsbury's interests. Chairman Howrey defended the Commission's legal conclusions gamely for a while. Then, after he had been accused by a Senator of having ''done some damage to [his] judicial position'' by joining in an Attorney General's committee's report on some of these questions, Chairman Howrey abruptly announced his withdrawal from the Pillsbury case, because ''the question you are asking . . . is a much greater challenge to judicial processes, because I am sitting as a quasi-judicial officer in that case.''[125] Chairman Howrey was soon off the Commission, but several others who had been in the Senate hearing room with him were commissioners five years later when the Commission decided against Pillsbury, maintaining again the legal theory the Senators had so vigorously challenged. Having been exposed to that pressure, the Fifth Circuit ruled, these commissioners should have disqualified themselves:

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[121] Judge Tamm is at pains in his opinion for the majority in *ANA*, not once but twice, to explain *Cinderella*—a case in which ''a person fac[ed] administrative prosecution for past behavior''—as involving ''specific'' reference to the adjudication pending and prejudgment of ''precise factual issues.'' Slip op. at 19. Whether or not this accurately describes the case as it was, the characterization suggests a limited future for the formula even for adjudicatory disqualification.

[122] This distinction is made by the majority opinions in *ANA*, slip op. at 38 (Tamm, J.) and 5 (Leventhal, J., concurring), and by Judge Washington in his *Texaco* concurrence, 336 F.2d at 764 n.6.

[123] 354 F.2d 952 (5th Cir. 1966).

[124] 15 U.S.C. § 18 (1976).

[125] 354 F.2d at 961. At the time of this inquest, Chairman Howrey is said already to have informed the White House of his intention to resign; in this context, his ''withdrawal'' from the case may have the guise of tactics more than injured judicial mien.

> To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the "wrong" decision, as the Senate subcommittee did in this case, sacrifices the appearance of impartiality—the *sine qua non* of American *judicial* justice—in favor of some short-run notions regarding the Congressional intent underlying an amendment to a statute, unfettered administration of which was committed by Congress to the Federal Trade Commission (See 15 U.S.C.A. § 21).[126]

Here again, one senses that the court may have overreacted. Had the Pillsbury Corporation not been named, the committee would surely have been permitted to inquire into the important legal interpretation at issue. Like Chairman Dixon's speeches, Chairman Howrey's appearance was a necessary and legitimate official function, but one not shared by judges. In refusing to recognize these functions, or in imposing strict standards of decorum, the appeals courts were to some degree denying validity to the presumption repeatedly relied upon by the Supreme Court, that public officers will be able to carry out all their official functions in a manner consistent with fairness. It is at least doubtful whether the Supreme Court could make the judgment "that, under a realistic appraisal of psychological tendencies and human weakness," combining adjudicative with public or congressional discussions of agency business "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[127] The courts of appeals, closer to the agencies and (perhaps for that reason) more skeptical of their performance, seem quicker to conclude that a decisionmaker has compromised his integrity.

Each of the cases discussed arose in a strictly accusatory context, the setting in which concern for fairness, and adjudicatory objectivity as an element of fairness, has always been strongest. Given that context and appropriate sensitivity to the distinction between individual circumstances and general policy, between what Cinderella in particular may have done and career school practices generally, the rules fashioned by the courts of appeals match general expectations about the demands of justice and cause no substantial inconvenience to agency functioning. It is significant that the results of these cases appear not to be significantly galling to—and, indeed, are in some respects welcomed by—the agencies whose behavior they control. Agencies are concerned with public perceptions of their credibility and fairness, and commissioners can find ways of talking about policy to the public or Congress without having to discuss the details of pending cases. The occasional "allegedly" or "our staff has asserted that" does not significantly interfere with any discussion a commissioner might wish to have, and contributes to the public's sense of his judiciousness.[128] The ability to warn Senator Smith's staff before a hearing to stay away from cases *X* or *Y*, now pending in litigation, offers, from the agency's view, welcome protection. No central function is threatened, and in the context of adjudication in on-the-record accusatory cases, the core values of impartiality are at stake. If the courts of appeals have been inattentive to differences between administrative and judicial functions in this context, the negative impacts of the resulting "judicialization" are slight, and the gains in apparent fairness to a public used to the judicial model may be substantial. In the setting in which, under the Constitution and the APA, administrative and judicial functions most closely merge, a hair-trigger response to apparent impropriety is acceptable.

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[126] Id. at 964 (footnote omitted).

[127] Withrow v. Larkin, 421 U.S. 35, 47 (1975), citing *Cement Institute*.

IV. Constraints on Policymakers: Disqualification for "Bias" or "Animus" in Rulemaking

The introduction to this Article suggested some of the special characteristics of agency rulemaking (or, more broadly, policymaking) complicating any inquiry into the question which individuals should not be permitted to participate in rulemaking. The intervening pages have sketched the two obvious models from which reasoning might be essayed, and the possible lines of extension of one, conflict of interest regulation, to rulemaking. What follows examines the possible application in the rulemaking context of prejudgment standards, and the somewhat distinct issue of "animus."

As already remarked, no agency currently provides in its regulations for disqualification in rulemaking for other than conflicts of interest. An explanation is provided by the reasons for limiting even conflict of interest analysis, and pointedly expressed in the agency responses to the ACUS survey. While private claims to "impartiality" are not thought to be as large in rulemaking as in adjudication—particular factfinding is not often involved, the stakes for particular individuals may often be less, and in any event the stakes are multidimensional—the chief reasons stated have to do with institutional functioning:

> "In policy-making or informal rulemaking . . . , adoption of disqualification rules . . . could inhibit the appointment and functioning of extremely qualified individuals whose very views were significant in their consideration for appointments. . . ."[129]
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> Disqualification "would be contrary to one of the main reasons for having agencies in the first place—namely, to create a storehouse of information that can be brought to bear on regulatory decisions in a flexible manner."[130]

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[128] See Kennecott Copper Co. v. FTC, 467 F.2d 67 (10th Cir. 1972).

[129] Letter of Dep't of Agriculture to Richard K. Berg, Executive Sec'y, ACUS, dated Aug. 7, 1979, at 2.

[130] Letter of Environmental Protection Agency, dated June 25, 1979, at 1.

> Other "procedural mechanisms . . . promote intellectual honesty and the appearance of fairness"—full notice, detailed explanation, recording of outside contacts, full internal consultations among numerous employees, etc. "A rule requiring disqualification . . . might force the agency to exclude its senior officials from the earliest periods of the decisionmaking process," yet such officials naturally must respond to newly discovered concerns, to the public and to Congress, and that response requires "detailed knowledge" and "candid discussion." [131]
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> "[A]gency decision-makers should be encouraged to discuss the policy issues before their agency with the public and to give their views on those issues." The possibility of disqualification "will discourage [such discussions] and thus injure the public's ability to understand (and influence) agency policy-making decisions.
>
> "Finally, the President . . . [a]s the nation's highest elected official . . . may properly . . . select nominees who are predisposed to carry out the policies of his administration . . . . To bar Members from participating . . . because of their policy preferences would frustrate the President's authority . . . ." [132]

Some scope for disqualification nonetheless appears to be recognized, even though not formally provided for. For example, many agencies stated that a decisionmaker personally unable to accept and respond to public input during the public processes of rulemaking would appropriately be subject to disqualification. Seven independent agencies submitted an amicus curiae brief at the court of appeals level in the *ANA* litigation, in which they put forward the proposition, adopted *in haec verba* by the court, that disqualification should occur "when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." [133] Responses to the ACUS survey suggested a widespread disposition to apply a similar standard—excluding the closed-minded, but with care not to discourage the public expression, even strongly, of "preliminary views." [134] Chilling of that dialogue was frequently identified as a major negative consequence of a disqualification standard, and one therefore to be guarded against in its formulation.

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[131] Letter of the Food & Drug Division, Office of General Counsel of Dep't of HEW, dated July 24, 1979, at 3-4.

[132] Letter from Philip J. Bakes, Jr., General Counsel, CAB, dated Aug. 16, 1979, at 2.

[133] Brief for Independent Regulatory Agencies as Amici Curiae at 14-15.

[134] "[I]ntemperate public statements," indicating that one is "not prepared to approach regulatory decisions with a mind open to persuasion," arguably disqualify—but on account of "personal attitudes of the decisionmaker in question, not . . . what he was exposed to by way of information." Letter of EPA, supra note 130.

The Department of Transportation referred to "personal hostility" or unalterable predisposition, as distinct from knowledgeability. "The question should be whether the degree of disposition precludes the decisionmakers from being objective." Individual responses from the agencies signatory to the amicus brief reflected a similar view.

The response of the Consumer Product Safety Commission suggested a related proposition, analogous to the rule that a judge should not participate in appellate review of his own trial decision. An administrator, the response suggests, is more capable of reevaluating a judgment he has previously made but identified as tentative—a proposed rule, a determination of probable cause, or the like—than a judgment taken with an expectation of finality, and for this reason should avoid external activities in which "final" judgment on matters of interest to the Commission may be called for.[135] This consideration appears to be reflected in the Conference's recent recommendations on Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation.[136] Standard-setting organizations produce rule-like definitions of health and safety standards which may also be the subject of federal rulemaking; the Conference believed that agency participation in standard setting was desirable, but that this participation had to be shielded from the fact or appearance of agency commitment to the standards set. Thus, it reasoned, agency representatives should have no authority to vote in the standard-setting organization or bind the agency to its conclusions; within the agency itself the representatives should exercise no decisional authority (as distinct from providing information and advice) save in cases of necessity. The CPSC has adopted more far-reaching regulations insulating participants in standard-setting from decisional responsibility in rulemaking.[137]

The Conference recommendation and CPSC rules are, in effect, limited disqualification standards. Certain agency officials responsible for rulemaking are instructed not to engage in other, parallel behavior thought to compromise either the fact or the appearance of their objectivity. Conference consideration of this aspect of the recommendation was apparently controversial, some believing that at least unconscious cooption or commitment would result if the rulemaker were permitted to take part in the intense consideration preceding adoption of a voluntary standard; others, that any disqualification regime would intrude on institutional decision processes, rendering them less expert by depriving the agency of its best-informed personnel and disturbing the informal flow of ideas. Similar lines of controversy can be expected as a result of the study from which this Article is derived.[138]

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[135] A similar distinction appears to have been drawn by the Supreme Court in Withrow v. Larkin, 421 U.S. 35, 58 n.25 (1975). It may rest more on a right to have review be independent if review is provided than on general propositions about the psychological readiness of the decisionmaker to reconsider. When a judge is instructed by an appellate tribunal to retry a case, or decides himself to do so on the basis of post-verdict motions, we do not regard his objectivity in the second trial as having been compromised by his participation in the first—even though he regarded his first decision when reached as "final" in the usual sense.

[136] ACUS Recommendation 78-4, 1 C.F.R. § 305.78-4 (1980). The supporting study, Hamilton, The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health, 56 Tex. L. Rev. 1329 (1978), discusses government employee participation at 1466-73.

[137] 16 C.F.R. Part 1031 (1980). The stated concern of the regulations is with avoiding the risk of "losing . . . independence or impartiality." They preclude a designated group of high level officials who "make the final decision [within CPSC] or . . . advise those who make [it]" from any participation in nongovernmental standard-setting agencies; permit another designated group whose members "develop the final recommendation" to participate only with case-by-case clearance; and allow other employees to participate only on stated conditions—that they not lead, that their participation not be approved in advance and reported upon afterwards, that meetings be public, and so forth. Other agency practices, as of 1977, are described in Hamilton, supra note 136, at 1467-69.

The resolution reached suggests two judgments restricting disqualification, from which some instruction may possibly be taken. The first is that disqualification need not occur if "the agency has no other personnel with the requisite knowledge and expertise"; the second, that it extends only to decision *making* and not to "providing information and advice."

The first of these judgments is far more forgiving than the "doctrine of necessity" sometimes applicable in the adjudicatory context. In adjudication, that there is no equally qualified substitute decider is not enough to invoke necessity; a substitute must be wholly unavailable. In the consultant's report leading to the Conference recommendation, the view had been strongly expressed that representatives to standard-setting organizations be drawn from no higher than middle level employees, "[t]o preserve the appearance of agency independence and objectivity."[139] This limitation was not expressed in the Conference recommendation, apparently on the understanding that high level participation would sometimes be desirable. Thus, while the recommendation implies that high level participation should ordinarily be avoided, its disqualification standard is a weak one, rather easily overcome by the agency's needs.

The second judgment, that the agency representative to the standard setter may continue to provide information and advice within the agency, is also more permissive than adjudicatory disqualification.[140] As separation of functions and ex parte contact rules vividly show, restrictions on informing and advising by "biased" participants are regarded as central to the assurance of objectivity in adjudication. The recommended measure here serves more to create a buffer than to exclude the decisionmakers from the processes, influences, and results of the voluntary standard-setting process. The buffer is useful in preserving apparent freedom of action and apparent objectivity; but the judgment creating it (like the judgments confining the reach of separation of functions and ex parte contact constraints) is a limited one, sensitive to the needs of an institutional decisional process.

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[138] The dispute is itself unlikely to prove objectively resolvable; our knowledge of human psychology does not extend to quantifying the degrees of commitment or cooption that result from deciding that an issue is important enough to be studied, from participating in the formulation of proposal drafts on the basis of initial information and views, or from taking part as an agency representative in the compromise process of an external group facing similar issues. However, no agency and no court currently regards the first two activities as disqualifying; they are a regular part of the activity of agency rulemakers. The third activity is, of course, the subject of the conference recommendation.

[139] Hamilton, supra note 136, at 1472.

[140] A similar accommodation appears in the recent Conference recommendation on reimbursement of participants' expenses by the FTC, ACUS Recommendation 79-5, 45 Fed. Reg. 2307 (1980) (to be codified at 1 C.F.R. § 305.79-5). The staff engaged in developing proposed rules, the Conference's consultant concluded, often acquired "strong feelings about the need for regulation and the shape that rule provisions ought to take." B. Boyer, Expense-Reimbursing Public Participants in Administrative Rulemaking: The Federal Trade Commission Experience 79-80 (Draft 1979). The resulting "color" on the staff's funding recommendations strongly supports the FTC's judgment, approved by the Conference, to have others make the funding decision. At the same time, their advice is essential for efficient assessment of the applicant's potential contribution to a complex record; and public disclosure of that advice (with possible ensuing controversies) presents costs which, it seems to have been agreed, outweigh any benefits of publicity. Thus, the Conference has recommended that rulemaking staff be permitted to advise but not decide about reimbursement issues; "wherever feasible," those who do decide should also be given access to experts outside the offices directly responsible for the rulemaking.

A. *Bias or Prejudgment*—Association of National Advertisers v. FTC

The procedural context of the *ANA* case,[141] described briefly in the introduction, made it a relatively strong case for considering rulemaking disqualification. Although no statutory or regulatory provision explicitly requires impartiality, Congress has provided in the Magnuson-Moss Act a statutory regime with many of the trappings of trial procedure. For Judge Gesell in the district court the syllogism was simple. On-the-record proceedings involving adversary, oral procedures ordinarily require impartiality in the decisionmaker. Magnuson-Moss Act procedures envision adversary, on-the-record proceedings as to certain facts. Therefore, participants in Magnuson-Moss Act rulemakings are entitled to a decisionmaker impartial as to those facts.[142] Whether or not one agrees that the issue here is as simple as Judge Gesell found it, the relative strength of the case for a disqualification regime should be apparent.

This line of argument depends for its strength on the presence of a requirement for on-the-record adversariness, procedures that make objectivity important. As has already been remarked,[143] nothing in section 553 of the APA or general agency practice under that provision suggests a basis for such an argument respecting rulemaking generally. And the majority in the court of appeals on review of *ANA* found that, even in the special statutory circumstances of Magnuson-Moss, the characteristics of rulemaking required disqualification regimes to be significantly more limited than those applying in adjudication. It agreed that an impartial decisionmaker was required. But the differing nature of factual issues in rulemaking and adjudications, the impossibility of separating fact from policy in the former setting, and the administrator's corresponding imperative to form and express his views at an early stage, led it to eschew "formulation of a disqualification standard that impinges on the political process."[144] Judge Tamm wrote for himself and Judge Leventhal that an agency member may be disqualified (in rulemaking) "only when there has been a clear and convincing showing that [he] has an unalterably closed mind on matters critical to the disposition of the proceeding."[145] On the facts, he found, that test was not met. Judge MacKinnon, in dissent, found this test too strong a formulation—a fence "horse high, pig tight and bull strong."[146] Drawing what he found to be appropriate inferences from the FTC's special rulemaking procedures, he concluded that partiality could be established by a preponderant showing of substantial prejudgment on any critical fact; that showing, he argued at length, had been made.

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[141] No. 79-1117 (D.C. Cir. Dec. 27, 1979), cert. denied, 48 U.S.L.W. 3820 (1980).

[142] 460 F. Supp. 996 (D.D.C. 1978).

[143] See text accompanying notes 91-93 supra.

[144] *ANA*, slip op. at 48.

[145] Id. at 38.

[146] Id. at 15 (MacKinnon, J., dissenting in part and concurring in part).

1. *A Constitutional Requirement of Openmindedness in Rulemaking?* Recognizing that statutes like those involved in *ANA* might present the strongest case for disqualification regimes, one may nonetheless start with the issue whether due process requires impartiality as to fact (as distinct from freedom from disabling conflicts of interests) in all informal rulemaking. A more general premise than Judge Gesell employed in his reasoning, one suggesting extension of disqualification standards to less formal rulemakings, would be that constitutional due process requires impartiality (however defined) in the decisionmaker in any rulemaking likely to have significant adverse impacts on an individual. Under this premise, the *ANA* dispute would not turn only on the meaning of the Magnuson-Moss Act, and disqualification might be an appropriate issue in any significant APA rulemaking.

A due process argument for disqualification in rulemaking must begin with recognition of the very limited scope the Supreme Court has given "prejudgment" as a due process issue in cases of adjudication, suggesting as a test even in that context whether the decisionmaker's mind was "irrevocably closed" or subject to a "personal" (as distinct from official) psychological commitment.[147] Beyond that, the Court has given little indication that it regards due process as a significant issue for any purpose in the rulemaking context. While legislative procedure, as distinct from legislative result, might seem fairly within the reach of due process concerns,[148] the Supreme Court appears committed to Justice Holmes's classic proposition that in policy formation, citizen interests are protected "in the only way they can be in a complex society, by [the individual's] power, immediate *or remote,* over those who make the rule."[149] Any exceptions, it has supposed, would be "extremely rare,"[150] as where the determinations are essentially individual in character, affecting particular persons in an exceptional way;[151] they would not occur in the context of *general* rulemaking.[152]

In his thoughtful analysis of the "due process of lawmaking,"[153] Professor (now Justice) Hans Linde drew a distinction between legislation and rulemaking which could further the "fairness" claim, and thus diminish the force of Holmes's aphorism. "[P]olicy-makers . . . limited to prescribed aims," as agency rulemakers are, may be distinguished theoretically from legislators "free to pursue any aim of their own choice."[154] The former, he asserted, have a constitutional obligation of explanation or justification not shared by general purpose legislative bodies—a "duty to defend the rationality of a decision," to use "the methods of rational policy analysis" to relate the action taken to "a goal within the scope of [their] assignment."[155] Acceptance of this distinction, not yet to be found in Supreme Court opinions, would give constitutional dimensions to whatever procedures may be inherently required for "rational policy analysis."[156]

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[147] See text accompanying notes 94-99 supra.

[148] The Supreme Court's analyses of the circumstances in which process is constitutionally due have stressed the need to show a deprivation of "life, liberty or property," see, e.g., Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). It is regarded as generally inappropriate to examine a statute for that effect; such an analysis evokes the dubious realm of substantive due process. Rules would appear to present a like situation.

[149] Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (emphasis added). See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 435 U.S. 519, 542 (1978).

[150] 435 U.S. at 524.

[151] Id. at 542. See also Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

[152] 435 U.S. at 542 n.16.

[153] Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197 (1976).

The judges of the court of appeals seem to have assumed that "due process" was implicated in their judgment, but without explaining how they reached this result.[157] Although the majority and minority opinions do not rely on Professor Linde's analysis, one aspect of their disagreement suggests parallels to his distinction between general-purpose and special-purpose rulemakers. The majority draws heavily on an analogy to legislative action in reaching its conclusion that "due process" requires little independent of what Congress may have chosen to require;[158] elsewhere the majority stresses the necessarily political character of general rulemaking and the need to avoid legal rules that would inhibit its operation.[159] For Judge MacKinnon, on the other hand, the analogy to a legislature is inapt: legislative bodies are controlled by the diversity of their membership and direct electoral responsibilities; agencies may have some political aspects, but judicial enforcement of principles of rational decisionmaking (which in this instance include protections against prejudgment) is also fully appropriate.[160] Whether on his analysis these principles emerge from the Constitution independent of statute is unclear, but perhaps not important to resolve.

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[154] Id. at 229.

[155] Id. at 225-30.

[156] The argument for the Linde approach might seem particularly strong where the rulemaking will resolve technological or other issues of a specific and factual, more than judgmental, character—especially if those issues would otherwise be subject to resolution in adjudicatory proceedings. The question then would be whether the presence of prejudgment, as distinct from financial self-interest, is inconsistent with those procedures.

Professor Linde's analysis and some existing case law suggest that serving financial self-interest may be constitutionally disqualifying in this setting. Id. at 249-50, citing McNamara v. Borough of Saddle River, 60 N.J. Super. 367, 158 A.2d 722 (1960); see also State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc., 40 Cal. 2d 436, 440-46, 254 P.2d 29, 31-34 (1953). The Supreme Court's decision in Friedman v. Rogers, 440 U.S. 1, 18 (1979), on the other hand, unanimously denied the existence of any "constitutional right to be regulated by a Board that is sympathetic to [that is, not structured to be financially biased against] the commercial practice of optometry," and limited the due process claim for disqualification for financial interest specially to the setting of a "disciplinary proceeding." No basis for claiming disqualification for factual prejudgment, a weaker claim than financial self-interest, appears.

[157] *ANA*, slip op. at 47 (Tamm, J.), 3 (Leventhal, J., concurring). The references to "fundamental notions of fairness" in other D.C. Circuit rulemaking review opinions are equally without precedential support, and tend to involve determinations of limited and exceptional impact. E.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). Compare Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

[158] *ANA*, slip op. at 27-28. "No court to our knowledge has imposed procedural requirements on a legislature before it may act. Indeed, any suggestion that congressmen may not prejudge factual and policy issues is fanciful." Id. See Townsend v. Yeomans, 301 U.S. 441, 451 (1937). Compare Hennessy v. NCAA, 564 F.2d 1136 (5th Cir. 1977).

[159] *ANA*, slip op. at 34-35, 48.

This is, of course, hardly the first instance when confusion or controversy has clouded judicial determinations of what "fairness" requires. The vigorous and sometimes bitter debates within the Vinson and Warren Courts regarding "incorporation" of Bill of Rights liberties into the fourteenth amendment by interpretation of the due process clause pitted proponents of informed judicial intuition, on the one hand, against those who insisted that responsible judicial action could be based only on concrete, external sources.[161] If explicit standards are to be the guide, none exist in the Constitution, in the regular practice of legislatures or the case law respecting it, or indeed in the prior case law of administrative procedure. The *ANA* majority explicitly notes this absence of external standards, even as it proceeds to "determin[e] the due process standards applicable."[162] If, on the other hand, judges are to rely on informed judicial intuition—and in the administrative law context there may be no realistic alternative[163]—the risks of that approach have led judges using it to seek "to eliminate the purely personal preference," by "respectful deference" to the views of other tribunals or the legislature and by deriving conclusions from judgments already made by others rather than by "making new moral choices."[164] As has been seen, external judgments about the requirements of fairness in rulemaking are few, and those that exist are extremely permissive.[165] Should a statute be enacted explicitly denying any opportunity to claim disqualification for prejudgment by a rulemaker, it would surely withstand constitutional attack.[166] Despite the trappings of constitutional language and evident concern of the judges for "fairness," the decision in *ANA* is best understood as a statutory holding only.

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[160] Id. at 26-29.

[161] See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968); Rochin v. California, 342 U.S. 165 (1952); Adamson v. California, 332 U.S. 46 (1947). To my colleague Benno Schmidt, Jr., I owe the observation that this dispute should not be understood merely as one over judicial function in the determination of procedural issues; it occurred in the wake of the substantive due process excesses of the 1920's and 1930's, and each side might have believed its approach better constituted to avoiding a renewal of judicial aggrandizement. See generally Linde, supra note 153.

[162] *ANA*, slip op. at 27-28.

[163] That understanding appears to be reflected in the Court's often quoted observation, in Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961), that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

[164] G. Gunther, Constitutional Law 523 (9th ed. 1975), quoting Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 Yale L.J. 319 (1957). Certainly in the incorporation debate those who pursued the more subjective, "civilized standards of decency" approach demonstrated by the results they reached substantial deference to the procedural assessments of others; procedural activism is associated with the pro-incorporation side of the debate. The Court has often stressed deference to congressional judgment about administrative procedure, using those judgments as a model for its own determinations as well as generally refusing to disturb them under challenge. Compare Wong Yang Sung v. McGrath, 339 U.S. 33, modified, 339 U.S. 908 (1950), with Marcello v. Bonds, 349 U.S. 302 (1955). See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); Goldberg v. Kelly, 397 U.S. 254 (1970).

[165] See note 156 supra.

[166] See Friedman v. Rogers, 440 U.S. 1 (1979), discussed in note 156 supra.

2. *Inferring Prejudgment Standards from Procedural Choices.* Although it was influenced by intuitive notions of fairness, the court of appeals debate chiefly concerned how Congress's procedural choices in the Magnuson-Moss Act bore on the disqualification issue. Several propositions appear to have been agreed upon by all judges: first, that the disqualification question had not been explicitly faced in Congress, for any specific congressional resolution would have been controlling; second, that *some* standard of disqualification should be inferred from the Magnuson-Moss Act procedures; third, that this standard had particular importance for those factual issues that were to be referred for decision on the record, following trial-type procedure; and finally, that the *Cinderella* test for adjudication, whether "a disinterested observer may conclude that [he] has in some measure adjudged the facts . . . in advance of hearing," was inapplicable. Even the dissent would have required "the moving party [to] show by a *preponderance* of the evidence that the decisionmaker could not participate fairly in the formulation of the rule because of *substantial* bias or prejudgment on any *critical fact* that must be resolved in such formulation."[167] The stressed words indicate the areas of disagreement with the majority,[168] to which we shortly return; for the moment we focus on the areas of agreement.

a. *Matters Not in Dispute—A Limited Standard for Special Circumstances.* Majority and dissent agreed on the proposition, which also characterizes current congressional efforts at general administrative reform, that prejudgment is an appropriate inquiry for—but only for—issues requiring the procedures of trial for resolution. Any general consideration of extending the use of "modified," "general," or "hybrid" procedures will inevitably involve consideration of the extent to which the objectivity of the decisionmaker must be assured. To gauge by currently pending reform proposals, moreover, any congressional action *will* impose a measure of disqualification in proceedings conducted in some measure on the record through trial-type procedures.[169] In contrast with the APA separation of functions provisions discussed above,[170] all the pending proposals assume that *some* internal separation of functions should be enforced, that to that extent the influence of prejudgment or bias is to be avoided.[171] Such protections readily imply other protections for impartiality as to fact. By way of contrast, no serious legislative consideration is being given to extending separation of function or prejudgment standards to settings in which a decision does *not* occur "on the record" in some measure. If legislators are satisfied to have free discussion within the agency, no matter how committed the discussants, it is hard to infer significant concern with protecting objectivity.

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[167] *ANA*, slip op. at 37 (MacKinnon, J., dissenting in part and concurring in part) (emphasis added).

[168] See text accompanying note 188 infra.

[169] Debate over the extent to which objectivity is to be required has been most explicit in the separation of functions context, where proposals vary from extension of the current standards of § 554(d), not now applicable to formal rulemaking, see S. 262, 96th Cong., 1st Sess. § 202(c) (1979), to segregation from the decisionmaker only of those agency employees most immediately involved in presenting the agency's "case," S. 2147, 96th Cong., 1st Sess. (1979); H.R. 3263, 96th Cong., 1st Sess. § 202 (1979).

[170] See text accompanying note 92 supra.

[171] The section-by-section analysis accompanying S. Doc. No. 2147, supra note 169, states that "trial staff" are separated "because this is a job that can generally only be done well by people who take an adversarial position toward the issues," an attitude fairly regarded as disqualifying in the committee's view. Wider disqualification, however, would "affirmatively diminish the quality of agency decisions" by restricting an agency's use of its expertise. 125 Cong. Rec. S19061 (daily ed.

In ordinary rulemaking, there is neither a statutorily defined record nor any indication that rulemaking is to be confined to one or assessed by one. Participants' procedural rights are rights of access, not rebuttal, and consequently the pre-existence of a state of mind that would effectively impede one's ability to rebut is an irrelevancy. If, however, Congress has adopted procedures defining a record, requiring the results of rulemaking to be supported by "substantial evidence," and, fairly read, recognizing an interest in rebuttal, then concern with objectivity is a fair inference.

The interest in an opportunity to know, confront, and oppose or rebut others' views is the central factor in this aspect of the analysis. Traditionally, that has not been viewed as a feature of informal rulemaking. The APA states no requirement that the agency expose its data base. If a commenter chooses to submit its views at the last moment, others, however appalled, acquire no right to force agency consideration of a reply. Of course, the conclusion reached will vary with changes in the procedures employed. If an agency voluntarily conducts rulemaking in a manner suggesting acceptance of the desirability of confrontation as to some issues, application of disqualification standards may be implied. Recent case law developments, notably in the D.C. Circuit, suggest increasing acceptance of the view that an opportunity for "adversarial comment" is an inherent part of section 553 procedure.[172] Although the Administrative Conference has rejected that view as "converting rulemaking proceedings into a species of adjudication . . . neither practicable nor desirable,"[173] its influence appears to be growing. To the extent effective reply or adversarial critique is recognized as a valid procedural claim in informal rulemaking, a right to objectivity in the decisionmaker according to some standard is likely to follow.

Even in the setting in which some measure of impartiality will be required, the *ANA* judges all agreed that the prejudgment inquiry should be more limited than would be the case for adjudication. None of the congressional proposals or discussions indicate a different judgment. The factors that underlie this apparent judicial and legislative agreement are those already suggested in the introductory material.[174]

Dec. 18, 1979). While trial staff "bias" may not be inevitable, it should not be surprising; the Conference study of FTC rulemaking under the Magnuson-Moss Act—which contains no comparable separation of functions provision—finds that it has been generated in that particular setting. See also note 19 supra.

[172] Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973), cert denied, 417 U.S. 921 (1974).

[173] ACUS Recommendation 77-3, 1 C.F.R. § 305.77-3 (1980).

[174] See text accompanying notes 16-25, 129-32 supra.

Ordinary rulemaking is impossible without some prejudgment by the rulemaker, and modern trends emphasize that requirement. A rulemaker must form a preliminary view if he is to make a proposal; in Judge Leventhal's words, "one cannot even conceive of an agency conducting a rulemaking proceeding unless it had delved into the subject sufficiently to become concerned that there was an evil or abuse that required regulatory response."[175] The increasing insistence that administrators take formal responsibility for the formulation of agency policy,[176] that rulemaking proposals be published with elaborate analyses of possible economic and/or environmental impacts and realistic alternatives, and that the proposals also reveal the data base on which the agency has acted—all emphasize the inevitability of prejudgment. Even in the past, significant proposals for rulemaking were rarely the unsupervised product of low-ranking officials; today it must be assumed that any significant proposal will have attracted substantial oversight—hence prejudgment—from the top.

Prejudgment is inevitable in another respect, shown by the absence of separation of functions constraints. At the staff level, no distinction is made between proponents (or, for that matter, opponents) of rulemaking and participants in it; the integration of decisional function, the institutional decisional process, is regarded as one of the strengths of rulemaking as a procedural mode. As some respondents to the ACUS survey noted, the wide range of staff officials who may participate in any given rulemaking is itself some assurance of objectivity. The point, here, however, is that there *is* a wide range of participation, thought to be important because of the contribution made to institutional decision; some or all of these participants will have formed prejudgments whether or not their superiors have, and they will take advocacy positions in the internal debate. It is important to note that "disqualification" would reach these concerned agency staff members as well as the commissioners themselves. The judgment not to exclude them rests on practical political assessments that it is too expensive and cumbersome to maintain agencies with multiple expert staffs; that the assistance of these experts is more essential to sound policy formation than it would be to resolving a particular dispute about the consequences to be attached to past action; that the possible influence of emotional attachment to preformed conceptions is less harmful to private interests when those conceptions concern policy matters subject to public discussion and legislative change rather than final determinations of individual guilt. The public may, of course, reassess this balance, but present judgment is that it would be a mistake to do so. All the opinions acknowledged these implications, although not focusing—as the facts did not require them to—on the consequences of applying a disqualification regime below the agency level.[177]

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[175] *ANA*, slip op. at 4.

[176] See, e.g., the requirements for executive agency rulemaking stated in Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978).

[177] E.g., *ANA*, slip op. at 35: "[A] neutral and detached adjudicator is simply an inapposite role model for an administrator who must translate broad statutory commands into concrete social policies."

In addition to the prejudgments that rulemaking procedures *require* agency actors to form, other aspects of agency functioning are at least conducive to their formation. Agency heads are appointed in a political process to serve avowedly political ends, and their success is measured by their ability to carry specific desired policy into effect. They must regularly defend their programs to the White House and Congress, to regulated industry and the public. In such a setting, commitment is inevitable and desirable. Nor are outside contacts solely confrontational; interchange of information and view is a continuing necessity for any agency. The processes of acquiring information and discussing possible future directions also produce and suggest prejudgments.

The range of probable legislative and judicial agreement here is suggested by the very limited development of precedent and principle on "undue influence" and ex parte contacts, the descriptions usually made of behavior outside the agency that might be productive of disapproved prejudgments. As mentioned earlier,[178] strictures against congressional interference in adjudication are generally accepted, even welcomed; suggestions of impropriety are much harder to find in the setting of policymaking.[179] And while the courts and others have begun to express limited concern with ex parte contacts in rulemaking, that concern is generally conceded to be inappropriate for the time *prior* to notice of proposed rulemaking, when agency prejudgments will most probably be formed.[180] In earlier opinions, Judge MacKinnon opposed the extension of constraints in both these contexts, protesting what he regarded as excessive interference with a properly political process;[181] presumably, then, he accepts in *ANA* the *general* legitimacy of political functions by agency rulemakers.

For the majority, these external political relationships were a major element contributing to selection of a disqualification standard. That standard must not "impinge[] upon the political process. An administrator's presence within an agency reflects the political judgment of the President and Senate."[182] Discussion of policy issues with industry and public, "appropriate and indeed mandatory for agency heads and staff,"[183] "would be futile . . . if the administrator could not test his own views on different audiences."[184] The majority was resolute that restrictions on ex parte contacts would not possibly apply prior to notice of rulemaking; that conclusion of course implies freedom to make contact[185] and thus to reveal attitudes or entertain dialogues that to others may signal prejudgment.

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[178] See text accompanying notes 123-28 supra.

[179] In D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972), the prevailing opinions were careful to state that the consideration of improper factors, rather than the making of improper approaches, was the flaw; the decision there was reached in informal adjudication, not rulemaking. Compare Texas Medical Ass'n v. Mathews, 408 F. Supp. 303 (W.D. Tex. 1976) (congressional pressure requires invalidation of rulemaking), with Florida Dep't of Health v. Califano, 449 F. Supp. 274 (N.D. Fla. 1978) (only "virulent" extrinsic pressures, involving threats of political retaliation, are objectionable).

[180] Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); see *ANA*, slip op. at 36 n.40, 44 (Tamm, J.).

[181] *Home Box Office*, 567 F.2d at 61-64; D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d at 1256-62.

[182] *ANA*, slip op. at 48 (Tamm, J.).

[183] Id. at 4 (Leventhal, J.).

[184] Id. at 38 (Tamm, J.).

At times, Judge MacKinnon's opinion appears to repudiate the majority's emphasis on the irreducibly political character of rulemaking. He views the analogy to a legislator as inappropriate and infers from the Magnuson-Moss Act a particular judgment to impose limits on political behavior by commissioners; he hints that some such limits would apply even in informal rulemaking.[186] Yet Judge MacKinnon denies any intent to prohibit the free interchange of ideas with other officials or the public. ''[P]ublic discussion of policy issues'' is desirable, but is to be distinguished from ''haranguing the public''; discussing the wisdom of various regulatory positions—acceptable behavior—is to be differentiated from loud advocacy.[187] The practical workability of this distinction can be questioned. It is even more difficult to distinguish the results of performing official responsibilities from evidence of personal zeal in assessing the impact of political contacts and responsibilities than in examining the consequences of intra-agency rulemaking practices. The distinction thus invites doubt, litigation, and variable outcome. If one accepts the distinction, however, the result can fairly be characterized as substantial agreement by Judge MacKinnon with the majority's views on the appropriateness of political contacts in rulemaking.

b. *Matters in Dispute—What Standard Is to Apply to Which Issues?* The disagreements in the court of appeals principally focused on what standard of disqualification should apply, and to what issues it should apply. The majority insisted on a ''clear and convincing'' showing of ''an unalterably closed mind''; the dissent, a preponderant showing of ''substantial bias or prejudgment.'' The majority and dissent each uses the adjective ''critical'' to describe the type of fact to which its test would apply, but the majority's discussion makes it appear that a ''critical'' matter must be very specific, one as to which cross-examination must be provided under the Magnuson-Moss Act, while the dissent regards ultimate conclusions and broadly defined social issues as coming within the test's protective reach.

(i). *Burden of demonstration.* No established principle suggests favoring the majority's ''clear and convincing'' standard or the dissent's ''preponderance.'' As indicated above[188] and remarked in the dissent,[189] the general tendency in recent enactments in other contexts has been to encourage disqualification. Judges may no longer regard themselves as being under a ''duty to sit''; mandatory disqualification is to be assessed not by the judge's subjective belief in his ability to be impartial, but by a ''reasonable'' observer's assessment whether his impartiality is subject to question. That burden is slighter for those challenging judges than either opinion in *ANA* would require of individuals seeking disqualification in a Magnuson-Moss rulemaking.

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[185] See note 136 supra.

[186] *ANA*, slip op. at 25-29. At the conclusion of this passage he remarks that ''[c]ourts have no power to [create] a legislative body of five members whose acts would not be subject to judicial review except to the same extent as Congressional statutes,'' strongly implying delegation concerns that would equally disable the Congress from creating such a body.

[187] Id. at 31.

[188] See text accompanying notes 68-70 supra.

[189] *ANA*, slip op. at 37 (MacKinnon, J., dissenting in part and concurring in part).

Reasons for repudiating so permissive an approach are apparent, and persuasive. In the agency context, the influence of necessity is substantially greater than in federal courts. A court litigant has no cognizable interest in the identity of the presiding judge at the trial, and if one is disqualified another of equal authority ordinarily sits. In an agency, ultimate decision can be made by only one, or, at most, a few individuals who are not interchangeable with available substitutes. Even where decisions are taken by a multimember commission, the removal of one or more commissioners at the behest of individual parties may, by changing the commission's balance, disturb an intended and legitimate "political judgment of the President and the Senate."[190] Particularly in the context of policy formulation, where permitted policy views will be hard to distinguish from prejudged fact and permitted discussion hard to tell from advocacy, application of a standard as stringent as that applied to judges would, as the majority in *ANA* feared, frequently "plunge courts into the midst of political battles concerning the proper formulation of administrative policy."[191]

This conclusion does not, however, demonstrate either the majority or the dissent to have been correct. All writing judges agreed on the need to avoid encouraging adventitious disqualification claims and to protect agency policymaking. All also agreed on the existence of a claim to impartiality in the particular circumstances of the Magnuson-Moss Act. The balance to be struck between fear of disruption and protection of objectivity was a policy judgment, which the writing judges resolved in policy terms. To the writer, the majority's resolution seems preferable; the integrated character of agency decisionmaking in rulemaking, the centrality of policy and political concerns, and the irreducible difficulty of reliably distinguishing policy from fact in the rulemaking context are persuasive. That, however, does not make the minority wrong—just ill advised from a given perspective. An analyst more highly valuing adversariness in party behavior and objectivity in agency behavior will reach the opposite conclusion.

(ii). *What is to be demonstrated?* Principle also does not force choice between the majority's "unalterably closed mind" and the dissent's "substantial bias or prejudgment." Both standards respect to some degree the difference between adjudication and policy formation, posing higher barriers to disqualification than does the test applicable in judicial proceedings. Choice between them is equally the product of a balancing process.

The dissent makes two observations about the majority test that may help frame the context for this choice. First, it notes that the "unalterably closed mind" test tolerates subjective self-evaluation in rulemaking, which is plainly repudiated by statute for judicial disqualification; an administrator who responds to a claim of prejudgment that he can consider all sides of the issue will not easily be disqualified on the majority's test. Second, the dissent notes, the majority's test is not fairly comparable to that applied to the disqualification of either judges or jurors. Judge or juror disqualification standards would not tolerate opinions on the facts that "would require evidence to remove";[192] the majority test does tolerate such opinions as long as they are not ineradicable.

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[190] Id. at 48 (Tamm, J.).
[191] Id.

Neither observation demonstrates that the majority is wrong. Even in the judicial context, subjective self-evaluation of possible bias was long accepted as the appropriate mode of analysis; the change to an objective standard has been undertaken only with the increasing incidence of multijudge districts and the ease of modern transportation. The stronger claims of necessity in the agency context and the weaker claims for objectivity in rulemaking readily validate use of a subjective test. Similarly, juror disqualification standards set a reference point usefully defining what (further) requirements could fairly be regarded as excessive, but do not demonstrate the test that must be met for rulemaking.

Indeed, any disqualification test must tolerate at least the degree of prejudgment inherent in the performance of rulemaking responsibilities. The process of formulating a rule could easily lead a rulemaker to the point at which evidence would be required to dislodge his preliminary judgment. The dissent does not seem to propose that such prejudgments be regarded as "substantial."[193] Something more is required. So long as the dissent's formulation is understood to accept the proposition most strongly stated in *Withrow*—that combined official functions and any resultant prejudgment are not in themselves sufficient to require disqualification—principle does not force a choice between it and the majority's view.

(iii). *As to what facts?* It is clearly established—in judicial as well as administrative settings—that only factual, not policy, issues are appropriate for application of disqualification standards; what *is* such a factual issue in rulemaking, however, is more controversial. In its prior consideration of the problems of hybrid procedures, the Administrative Conference, following established lines of scholarly analysis, has referred to several categories of facts. There is, first, the distinction between "basic facts," the raw material of judgment, and "ultimate facts," the judgment- and policy-laden conclusion of a fact-assessment process, the ultimate matter to be found. Second, there is the distinction, discussed above,[194] between "adjudicative" and "legislative" facts, between facts of an historical character pertaining to particular individuals and those involving greater elements of judgment or detached from the particular circumstances of a given participant in the proceeding. Finally, within the category of legislative fact, the Conference has distinguished between "specific" and nonspecific fact, the former presenting issues "sufficiently narrow in focus and sufficiently material to the outcome" to make the use of trial-type procedures for their determination "reasonable and useful."[195] In its recent study of Magnuson-Moss Act rulemaking the Conference commended the development of approaches like those already employed by the Environmental Protection Agency, which limit the use of trial-type procedures to issues of "specific fact."[196]

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[192] Beck v. Washington, 369 U.S. 541, 557 (1962), cited in *ANA*, slip op. at 35 n.11 (MacKinnon, J., dissenting in part and concurring in part).

[193] See text accompanying note 171 supra.

[194] See notes 82-84 and accompanying text supra.

[195] See ACUS Recommendation 72-5, 1 C.F.R. § 305.72-5 (1979); H.R. Rep. No. 93-1606, 93d Cong., 2d Sess. 33 (1974) (report on Magnuson-Moss Act), both cited with approval in the majority opinion in *ANA*, slip op. at 23-24.

The various categories are hardly airtight and may be excessively scholastic, but they are reasonably well understood and—although subject to the strains suggested earlier[197]—they identify with reasonable fidelity those circumstances traditionally thought to require the protections of adversary process before an "impartial" decider. Even for judges, "legislative facts" are subject to unregulated judicial notice—while there are strong suggestions that "specific facts" ought not to be so lightly found, the drafters of the Federal Rules of Evidence were unable to write the formula that would produce that result without working mischief to judicial policy formulation.[198] The *ANA* majority, accepting these analyses, would find disqualification appropriate only for issues of "adjudicative" or "specific" fact. Indeed, the majority builds on the difficulty of the distinctions as an argument against ready disqualification: because "the factual component of generalized rulemaking cannot be severed from the pure policy aspects of the rule,"[199] a distinctly factual prejudgment cannot readily be distinguished from a prejudgment of policy of which the law should take no heed. The dissent, on the other hand, regards a broad range of prejudgments as possibly "factual" for prejudgment purposes, ignoring these distinctions.

Indeed, it is surprising that the *ANA* court reached the merits of the disqualification issue rather than reversing on prematurity grounds. The rulemaking in *ANA* had not yet proceeded to the point of identifying any particular issues as having the materiality, specificity, and controversiality to require on-the-record trial under the Magnuson-Moss Act. The factual assertions which had been made by Chairman Pertschuk were of the most general character—that small children are impressionable, that use of sugared foods contributes to tooth decay, and so forth. These are "legislative" propositions ill suited to adversary processes and falling well outside the range of specific dispute over technological or like matters that can be "decisively resolved by testimony"[200] and that had led first the D.C. Circuit and then Congress to provide an occasion for hybrid rulemaking.[201] If apparent prejudgment of such broadly framed issues, much less the "ultimate fact" of need for a rule to remedy these problems,[202] suffices to establish disqualification, policymaking will indeed be impinged upon—both by the occasions given for litigation and by the impact of permitting a collateral issue to interfere with the rulemaking process.

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[196] Commentary by Conference officials at the time the Magnuson-Moss Act was under consideration had pointed in the same direction. See *ANA*, slip op. at 24, 25, citing communications of Chairman Scalia and Executive Secretary Berg.

[197] See text accompanying notes 81-84 supra.

[198] See id.

[199] *ANA*, slip op. at 20.

[200] American Airlines, Inc. v. CAB, 359 F.2d 624, 633 (D.C. Cir.), cert denied, 385 U.S. 843 (1966).

[201] An FTC administrative law judge has recommended in the continuation of the *ANA* proceeding that the extent to which children can distinguish between commercials and programs "to the point that they comprehend the selling purpose of television advertising aimed at children" be made one of the "disputed issues" for oral hearing in the proceeding. That recommendation may, of course, be in error or embody a political or litigation-avoidance judgment, as much as a judgment that this is a matter best suited for resolution by adversary trial.

[202] *ANA*, slip op. at 37 (MacKinnon, J., dissenting in part and concurring in part).

The working hypothesis of the Conference's recent work, and the predominant body of contemporary administrative law scholarship, is that the "specific fact" distinction can be made. A characteristic of "specific facts" is that they do *not* require judgment, prediction, or policy orientation for determination. Although not "adjudicative facts" in the strictest sense—involving neither specific individuals nor historic circumstances—specific facts by hypothesis share the characteristics of concreteness and provability that make trial-type procedures superior for their determination. Determining the ductile strength of a given steel alloy differs from making a judgment about the anticompetitive impact of joint ownership of television stations and newspapers, in just this way. Facts about ductility *can* be developed through evidentiary hearings, and *are* severable from policy issues. To this extent the majority appears to be wrong. If a disqualification standard would be limited in its application to "specific facts," narrowly defined, policymaking functions would not be threatened. With careful definition of "fact" and "policy" no established principle favors the majority's formulation of a disqualification standard over the dissent's. Only the scope of application threatens effective policymaking. The implication of this analysis is, of course, that whether disqualifying prejudgment of specific facts in issue exists cannot be determined until those facts and the issues respecting them have been defined.[203]

Judge MacKinnon, however, was concerned with prejudgments not of specific fact, but "of the ultimate fact involved—the 'evil' of such advertising."[204] He objected not to Chairman Pertschuk's policy judgment that rules controlling advertisement of sugared cereals on children's television programming might be appropriate, but to his behavior as a "loud advocate[] . . . haranguing the public," his "vigorous and consistent advocacy."[205] Taking these observations at face value, one can suggest that the dissenting concern here is not with factual prejudgment but with decorum and the collection of considerations generally described under the heading "animus." The judge's perception was that Chairman Pertschuk set out to achieve a given result. What the underlying facts might be is less important than his apparent indifference to them. It may even be that his inner conviction is regarded as less important than his public behavior—behavior likely to engender disrespect for the agency's actions.[206]

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[203] See note 201 supra.

[204] *ANA*, slip op. at 37.

[205] Id. at 31.

[206] See Note, Regulator Disqualification from Rulemaking Proceedings, 57 Tex. L. Rev. 1193 (1979).

B. *"Animus" or Partisan Zeal*

The appearance of having taken sides with or against one of the participants is a well-established ground for judicial disqualification.[207] Even if a judge has learned all he knows within the four corners of the record, he may be disqualified if his behavior signals a loss of the necessary capacity to remain objective in assessing *new* material. Yet it is the business of judges to reach judgments on the basis of the material that unfolds before them, and it is inevitable that these judgments will form as the trial proceeds, that their shape will become apparent (if not immalleable) over time. A rule permitting ready disqualification of judges who appeared to be drawing conclusions from the matter properly before them would provide too easy a shield for the avoidance of deserved defeat; there is also the risk, borne out on occasion, that parties fearing defeat would be tempted to provoke the judge into a disqualifying show of judgment. For such reasons, courts discussing this aspect of judicial disqualification express no concern for the presence or strength of a judge's inner conviction absent evidence of disqualifying sources of information; public conduct is required. And such conduct, one senses, is viewed very much in context—against the backdrop formed by the behavior of the complaining party and the reviewing courts' appreciation of the normal pressures and tendencies of extended, hotly contested litigation. Only behavior reflecting irrational attachments or leanings appears to provoke appellate censure. Courts seek an indication of judicial attitude toward the parties[208] not rationally explainable in terms of the events disclosed of record. The risks of party manipulation otherwise are too high. The result is a very low apparent rate of disqualification relative to the number of occasions on which it might be sought on these grounds.

Disqualification for animus in agency rulemaking would be further complicated, particularly at the agency top, by the characteristics setting rulemaking apart from adjudication: the pre-notice involvement of agency heads in identifying the occasion for a rule and developing a proposal; the need for and appropriateness of their commitment to implement particular policies, commitments that may have sparked their appointment; and the need for and appropriateness of discussing evolving agency policy within and without the government, both to provoke sharing of information and views and to encourage voluntary compliance and political support. All of these activities are likely to produce outward indications of leaning and commitment. Consequently, to permit disqualification claims is to risk engendering litigation which—even if it does not often succeed—could chill important aspects of agency public life. The result would be to reduce the political controls over agencies, valid and valued controls that do not operate against judges or those acting in a judicial capacity. The more importance one attaches to these political processes and controls, the more hazardous is an animus ground for disqualification.[209]

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[207] See note 76 supra.

[208] Attitude toward the parties, although not always readily distinguishable from prejudgment as to disputed fact, is at the core in this context. A disposition to disbelieve the witnesses or distrust the motives or good faith of a party is the attitude characterizing judicial "animus" cases.

It is on the question of animus, moreover, that the conflict of interests analysis undertaken above[210] is most instructive. Even formal prior association with a participant in rulemaking does not require government executives and policymakers to step aside. Yet these associations plainly signal party affiliations. Although, increasingly, cooling-off periods are regarded as appropriate for those who come to government from employment in which they would have had a *financial* stake in the outcome of a proceeding pending at the time of their employment and in which they had participated, this judgment may exclude general rulemaking—another indication that likely commitment is not regarded as important. Most important here, cooling-off periods prompted by associations with *non*financial interests are currently observed chiefly as a voluntary matter and if adopted for the future (a step for which reasonable arguments can be made) will inevitably be hedged with substantial restrictions. The reasons for caution in extending conflict of interests analysis in this way reflect recognition of the legitimacy of strong policy views as an element of the appointive process and subsequent governmental action.

Whether rules permitting disqualification for demonstrated strength of feeling toward the subject of a rulemaking[211] would inhibit reasonable public discussion is, as an empirical question, not readily answered. Analogous concerns were felt in connection with enactment of the Freedom of Information[212] and Government in the Sunshine Acts;[213] the extent to which those measures have inhibited candid exchange of views has not been measured, nor can it easily be calculated whether, even assuming such impacts, the acts have conferred a net public benefit. To the writer, however, the argument that inhibition will occur seems the stronger. *Pillsbury Co. v. FTC*[214] has helped shape the character of congressional oversight of agency adjudication; *Texaco* and *Cinderella*[215] produce careful internal reviews of commissioner speeches against current dockets. Similar impacts on speechmaking and congressional appearances seem likely to occur in this context. It does not follow that those impacts are objectionable; that the gain in agency independence or public perceptions of fairness and "objectivity" do not counterbalance any losses. It bears repeating in making any such assessment, however, that in on-the-record adjudication both the values and the practical attainability of objectivity in the decisionmaker are at the core and political controls are regarded as inappropriate; for rulemaking, political controls are workable and generally accepted. In the current dispute over advertising directed to children, for example, most think it appropriate for Congress to discuss and act on the question of whether FTC competence extends to "unfair" as well as "deceptive" commercial practice even while that issue is pending at the FTC. Insulating FTC commissioners and staff from political discussions respecting such questions has much larger consequences than insulating them from political discussions of whether Pillsbury Co. has engaged in particular anticompetitive conduct.

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[209] The dispute between majority and minority in *ANA* is perhaps best understood in these terms. The majority stresses the political functions of rulemakers—functions independent of procedure as such. The dissent underscores the judicial characteristics of the procedures employed at one stage of the rulemaking, and in arguing that Chairman Pertschuk must be disqualified stresses his partisanship, his political ends in view, and the political settings in which he sought to build support for the soon-to-be-proposed rule. It is precisely the element of zeal, of attitude not toward fact as such but the supposed motives of the cereal manufacturers/advertisers and the outcome of the proceeding, that draws Judge MacKinnon's sharpest fire. See, e.g., slip op. at 31.

[210] See text accompanying notes 48-51 supra.

[211] One might not reach the same conclusions where focused personal hostility toward a particular participant could be shown—an improbable but possible state of affairs in rulemaking. In this context, the inquiry might be whether the affairs of the particular participant are so near the heart of the rulemaking as to suggest the possibility of a vendetta; or whether the participant's affairs are of peripheral concern or any hostility is expressed chiefly in its own behavior. See note 76 and accompanying text supra. But for the unusual case in which the possibility of vendetta might be made to appear, the dissent's test is well within reach of both general expectations and probable congressional outlook; it does not appear overly threatening to ordinary rulemaking processes or relationships.

[212] Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified at 5 U.S.C. § 552 (1976)).

[213] Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1976)).

[214] See note 123 and accompanying text supra.

Political controls also seem likely to serve as significant nonjudicial correctives for indecorous behavior. The recent legislative debates over FTC authority were fueled in no small measure by Chairman Pertschuk's public activism, including specifically his speeches on advertising directed to children. Seeming a partisan has real and immediate political impacts generally well understood by Washington regulators, impacts tending to promote judiciousness in expression but not threatening collateral litigation or the defeat of otherwise acceptable policy initiatives years after the agency's decision. The existence of the political controls, wholly inappropriate for judges or adjudication, both diminishes any need for judicial controls and signals their undesirability.

A rule permitting disqualification for apparent strength of feeling toward the subject of a rulemaking, then, is inappropriate in the absence of rather direct indications of congressional provision for such a rule. The result is too unusual, in terms of general expectations or Congress's own behavior, to make that inference easily. In particular, provision for hybrid or modified rulemaking procedures does not seem sufficient support. It is reasonable to infer from such a provision the judgment that a measure of objectivity is required as to the "specific facts" that are sharply in dispute. That flows more or less directly from the determination that trial-type procedures are appropriate for the assessment *of these facts*. It requires a further step to infer the judgment that the regulator may not have political commitments to act or enthusiasm for acting in the policy arena on which those facts bear. And that further step, if taken, will carry disqualification procedures into a setting in which extreme caution has been taken even as to judges—in recognition both of the natural consequences of decisionmaking in any complex matter, and of the dangers of party manipulation. For these reasons the majority test—or none at all—seems clearly preferable.

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[215] See notes 112-20 and accompanying text supra.

One may test these conclusions against Assistant Secretary Bingham's passionate speech to the Steelworkers.[216] Here, unlike *ANA*, the question of disqualification was raised only after the rulemaking was complete, on the basis of a speech given at a time when, inevitably, the intellectual process of reaching judgment would have been complete. The remarks she made indicate strong commitments on a variety of matters, ranging from the political to the technical. Undoubtedly, too, Dr. Bingham brought from her role in private life as a specialist in workplace health hazards strongly held views about the needs for worker safety; she had been selected precisely because of her background and attitude.

The largest element of the objections, as with Chairman Pertschuk, appears to have been to Dr. Bingham's choice of forum and manner. The speech was openly political, given as the most hotly objected of Chairman Pertschuk's remarks had been, to a constituency on the opposite side of the issue. From an industrialist's perspective, it must seem very raw, and would equally have seemed so had the speech been given after adoption of the standard. But at this level of generality, raw as it is, no requirement of detachment can be inferred from the statute or otherwise. In describing her trips through "the palace guard," Dr. Bingham described existing political processes of control that are an inherent part of rulemaking as currently understood; repudiation of those processes, if warranted, should not be accomplished through the back door of a disqualification standard. Solicitation of political support is equally part of an Assistant Secretary's job as now understood. Remarks about inflationary impact or attitudes toward the willingness of society to bear the added costs of worker protection, however strongly felt or misguided, are far too general to suggest prejudgment; they reflect the sorts of broad political attitudes that all experienced persons bring to public office.

Dr. Bingham's remarks about medical removal protection similarly fail to suggest prejudgments of fact. "Medical removal protection" is a regulatory measure requiring companies to maintain workers removed from a work environment for health reasons at their former rate of pay. OSHA's authority to impose such a measure and the need for it were hotly contested, but neither issue suggests disputes of fact as to which cross-examination or the ability to decide solely on the basis of a record are requisite. Even if, as appears, Dr. Bingham came to office with unshakeable views on these matters, that would be no occasion to disqualify. Whether she was wrong on the question of authority will of course be resolved by the courts; the disposition to impose a certain measure within her authority, if known, would be a valid reason only for making or withholding her appointment.

In short, the speech—fiery as it was—appears not to have reflected prejudgments on particular contested issues of specific fact. Its fire may well have cast discredit on the result in some quarters, contributed to a sense of unfairness or social malaise unfortunate in a society that depends largely on good will and voluntary compliance for adherence to law. The proper correctives, however, are political, not judicial; a judicial corrective would of necessity extend requirements of objectivity beyond their reach even in analogous judicial circumstances and correspondingly impair the necessary political controls of the regulatory system.[217]

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[216] See note 13 supra.

CONCLUSION

This analysis produces some reasonably firm conclusions and leaves other matters to political judgment.

Taking first the question of conflict of interests, disqualification in rulemaking is plainly appropriate in those circumstances, largely defined by federal statute, that involve present significant risks of present financial self-dealing. Mandatory disqualification for conflict of interest seems equally inappropriate on the ground merely of violation of the government's general precepts of ethical employee behavior. Between these poles lie the questions of whether adoption of a rule precluding investments only in companies principally regulated by an agency is sufficient protection against disqualifying self-dealing; and whether conflicts arising out of prior employment or present nonfinancial interests should be disqualifying. Answers to these questions derive from experience and world view, not logic; but extension of conflict of interest enforcement in each of these areas would reflect current trends. The indirect impacts of rulemaking on financial holdings can be substantial and so, in a society concerned to avoid self-dealing, disabling. "Cooling off periods," in increasing use, reflect heightened awareness that changes in associations do not produce sharp and immediate changes in loyalty or prior perspective. A legal system recognizing that nonfinancial interests can be substantial enough to sustain a claim to participate or sue seems also likely to recognize that they can be productive of disabling conflict.

Disqualification for bias or prejudgment in rulemaking had not been an established remedy prior to the decisions in *ANA*, and is not provided for in agency rules or practice. Federal agencies generally state a commitment to openmindedness on the part of decisionmakers, but rely on voluntary recusal. Analytically, the proposition that disqualification may be constitutionally required for fairness is very weak. Any such requirement is inferable only from particular statutory requirements of procedures suggestive of a need for objectivity. Nothing in APA section 553 supports such an inference, but an inference that protected objectivity in *some* measure is required could be drawn from statutes requiring use of trial-type procedures to a greater or lesser degree.

How much objectivity, how severe the disqualification test, is the more difficult question. A proper test must not interfere with necessary elements of policymaking activity; neither acts nor beliefs producing the decision to initiate a rule, the formulation of a proposal, or the conduct of policy discussions with Congress, the regulated industry, or the public should be regarded as disqualifying. A further proposition, mirroring the rules applicable to judicial disqualification, is that only prejudgment as to "fact" is even arguably disqualifying. Since the requirement of objectivity derives from statutory inference, the range of disqualification is appropriately limited to those facts subject to that inference—in the case of hybrid rulemaking procedures, the specific facts as to which full adversary procedures may be required.

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[217] The D.C. Circuit decided the United Steelworkers case on Aug. 15, 1980, upholding the rule against this challenge. United Steelworkers of America v. Marshall, No. 79-1048 (D.C. Cir. Aug. 15, 1980). The court admonished Dr. Bingham for "making statements so susceptible of an inference of bias, especially statements to a group so passionately involved." Slip op. at 18. But it found no commentary on specific factual issues that could warrant application of the *ANA* test.

Within the boundaries thus suggested, principle suggests no basis for choosing between a test of disqualification requiring a "clear and convincing" showing of "an unalterably closed mind" and one turning upon a preponderant showing of "substantial bias or prejudgment." The two tests reflect differing emphases, one preferring noninterference in an inevitably political process and the other, assurance of objectivity where a requirement of objectivity may fairly be inferred. But both tests place an appropriately greater burden of demonstration on the party seeking disqualification in rulemaking than would have to be met in adjudication. Within the suggested limits, neither is demonstrably wrong.

If one moves from the specific facts that may be shown in any case of hybrid rulemaking to warrant full trial consideration to the broader ranges of "legislative" or "ultimate" fact, the question shifts from factual prejudgment or bias to animus or partisan zealotry. While decorum in the conduct of public business is greatly to be sought, the hazards of seeking to enforce it in a rulemaking context, avowedly political, are even greater than they would be in the context of judicial activity. In this setting, absent evident personal vendetta, one might well prefer to leave correction of indecorous behavior entirely to the political realm—to congressional reaction, loss of public acceptance, and collegial censure. If disqualification is to be entertained at all by the courts, the barriers must be set extremely high.

APPENDIX

At its June 6, 1980, plenary session, the Administrative Conference adopted the following recommendations based on the preceding report:

RECOMMENDATION 80-4

DECISIONAL OFFICIALS' PARTICIPATION IN RULEMAKING PROCEEDINGS[218]

A. *Procedures*

1. Each rulemaking agency should promulgate procedures by means of which persons who desire to participate in a rulemaking proceeding (or who may

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[218] Administrative Conference of the United States, Recommendations, 45 Fed. Reg. 46771, 46776 (1980) (to be codified in 1 C.F.R. § 305.80-4).

be affected by its outcome) can challenge the suitability of participation by particular decisional personnel in that proceeding. The procedures should identify the factors that bear on suitability and should indicate the appropriate time, place, and means of making challenges, along with an indication of opportunity for intra-agency review if one be available.

2. The procedures should also make plain that a decisional official, whether or not challenged, may voluntarily abstain from participating in a particular proceeding.

B. *Conflict of Interests*

1. A decisional official whose financial interests or those of whose immediate family may be distinctively favored by choices to be made in a particular rulemaking proceeding should voluntarily abstain (or be required by the agency to abstain) from participation in that proceeding, subject to publicly stated and applied agency exceptions for *de minimis* holdings.

2. New agency officials should be subjected to "cooling off" periods of variable duration, during which their participation in a rulemaking proceeding would presumably be inappropriate if

(i) the proceeding specifically affects the financial interests of an immediately prior employer or client; or

(ii) the official's immediately prior employer or client is a participant in the proceeding; or

(iii) the official has participated in the proceeding before becoming a public employee.

An agency's application of a "cooling off" requirement should not, however, reflect absolutes. It should take into account the following factors, singly or in combination:

(a) the extent of the official's participation in a prior private capacity in the pending rulemaking proceeding;

(b) the elapse of time between the prior involvement and the official's present activity as a public employee;

(c) the nature and magnitude of the rulemaking's possible impact on the interests of the prior employer;

(d) the generality or specificity of the rulemaking's scope;

(e) the extent of the prior employer's participation;

(f) applicable professional standards;

(g) Senatorial consideration, during the confirmation process, of the official's prior relationships and activities.

3. An official's non-financial interests, associations, or activities (whether or not related to past employment) may in some instances suggest the desirability of recusal or, if need be, a direction to the official to abstain from participating in a particular proceeding. If the official's appointment has been confirmed by the Senate with knowledge of the appointee's past interests and activities, a required cooling off period would ordinarily be inappropriate. As to officials of lesser prominence, however, agencies may suitably utilize in respect of non-financial interests the procedures sketched above, related to financial conflict of

interests or to cooling off periods. The question of precluding participation should arise only when an identifiable interest is significant in relation to the proceeding and is likely to be substantially affected by its outcome. Mere membership in an association would not ordinarily be a ground for disqualification or recusal.

4. Finally, agency conflict of interests rules should make emphatically plain that they are in aid of the agency's self-management; that they are measures in furtherance of its own quality control rather than in amplification of judicial control; and that they are agency declarations for guidance of its own staff concerning decorum. An agency that is insensitive or lax in fulfilling its declared expectations will no doubt be of concern to the Congress or to the Executive, but an agency's heightened attentiveness to the qualities of decisional personnel should plainly not expand the occasions for or the scope of review of rulemaking proceedings.

C. *Prejudgment of Fact*

1. Disqualification for prejudgment in rulemaking should be limited to prejudgments of particular "adjudicative" or "specific" facts, where it may be inferred from the particular statutory framework, agency procedural choices, or other special circumstances that the agency's determination of those facts is to be based on the evidentiary record developed in the proceeding. Cause for disqualification can appropriately be decided by the agency only after it is established in the proceeding that such facts will be materially at issue in the proceeding. Such disqualification is inappropriate for factual judgments that are the consequence of earlier stages of the proceeding, of for prejudgments of policy.

2. To avoid undue interference with the legislative, policy-making aspect of the rulemaking process and other agency functions, disqualification for prejudgment of fact should be considered by the agency only after it has determined that critical "adjudicative" of "specific" facts require resolution on the evidentiary record developed in the proceeding, and should require at least a preponderant showing that an agency member or decisional employee has a closed mind regarding those facts.

D. *Decorum and Expression of Views*

A rulemaking proceeding should be conducted with decorum and respect for the interests of all concerned. Agency officials should therefore conscientiously avoid intemperate expression or other behavior suggestive of an irrevocable commitment to a predetermined outcome of the proceeding. This does not mean, however, that agency officials may not express factual judgments based on previous experience or on information received during a proceeding; nor does it suggest that officials may not act upon or voice opinions concerning underlying issues of policy. Expressing those opinions in interchanges with committees of the Congress, other administrative bodies, the public, and regulated groups is a desirable normality of administration, rather than an abnormality to be shunned, and is not a basis on which exclusion from a proceeding may appropriately be suggested.

REPORT IN SUPPORT OF RECOMMENDATION 80-5

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MULTI-PARTY FORUM SHOPPING FOR APPELLATE REVIEW OF ADMINISTRATIVE ACTION

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Judicial review of administrative action is a keystone of the American public law system. In individual agency statutes and in the Administrative Procedure Act[1] (APA) Congress has given the federal appellate courts jurisdiction to review agency actions on both substantive and procedural grounds.[2] The APA, however, does not specify a particular court for review,[3] and the venue provisions of individual agency statutes commonly allow for review in several possible circuits.[4] Understandably, an attorney will attempt to secure judicial review in the circuit in which his or her client will have the greatest chance for success.[5] In multi-party proceedings that result in multiple appeals to different circuits there must be a mechanism for determining which court shall hear the case.

Under 28 U.S.C. § 2112(a), the agency must file the record of the proceedings in the circuit in which the first petition was filed.[6]

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[1] Ch. 324, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).

[2] The APA gives appellate courts the power to "hold unlawful and set aside" the results of formal rulemakings and adjudications that are "unsupported by substantial evidence" and the results of informal rulemakings that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E) (1976). The appellate courts also have the power to set aside agency action that is "contrary to constitutional right, power, privilege, or immunity; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." *Id.* § 706(2)(B)-(D).

[3] The APA provides for judicial review in "a court specified by statute" or, if none is specified, in "[any] court of competent jurisdiction." 5 U.S.C. § 703 (1976). This Article will address only direct review of agency action by the United States courts of appeals. The vast array of agency actions that are reviewable in the first instance in federal district courts will not be studied here. Obviously, forum shopping opportunities arise in that context also to the extent that venue statutes are loosely drawn. For an excellent discussion of relative advantages of district court review versus direct appellate court review, see Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum,* 75 COLUM. L. REV. 1, 39-61 (1975).

[4] *See* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3816, at 102 n.4 (1976) [hereinafter cited as WRIGHT & MILLER]; 16 *id.* § 3941, at 305-08 nn.1-59 (citing statutory provisions for review in the United States courts of appeals); Comment, *Venue of NLRB Orders: An Invitation to Forum Shopping?,* 8 STAN. L. REV. 472 (1956). Special venue provisions are not uncommon. *See, e.g.,* Clean Air Act § 307(b), 42 U.S.C.A. § 7607(b)(1) (Supp. 1980) (providing for review of certain national standards only in the District of Columbia Circuit).

[5] *See* Comment, *supra* note 4, at 476; note 42 *infra.*

[6] If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

28 U.S.C. § 2112(a) (1976). Section 2112(a) on its face applies only to administrative "orders," and not to "rules." This raises the possibility that the section

Because the filing rules in the courts of appeals generally allow a petitioner to file terse and largely uninformative petitions for review,[7] the "first-to-file" rule of section 2112(a) and modern communications technology have combined to precipitate wild and often bizarre races to the courthouse. The winner is often determined by the agency's perceptions of the athletic prowess of competing counsel.[8] The inflexibility of the first-to-file rule is softened somewhat by a statutory provision that allows the court in which the petition was first filed to transfer the proceedings to another circuit court of appeals "[f]or the convenience of the parties in the interest of justice."[9] Courts have also spoken of their "inherent power" to transfer.[10] In deciding whether to order discretionary transfer the courts have considered many factors, including the presumed convenience of the parties,[11] the existence of ongoing proceedings involving the same or similar issues in other circuits,[12] the relative aggrievement of the parties,[13] and whether the agency action has a "regional impact."[14] Although the court of first filing normally hears the case,[15] a court will occasionally transfer, even to a circuit in which no petition for review has been filed.[16]

Unfortunately, agency and courthouse clocks have not kept pace with modern communications technology. In an increasing number of cases competing petitions have been filed virtually simultaneously. Several recent agency regulations, which specify a precise time at some future date at which rules become final for

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was intended to address only the final product of agency "adjudications," and not of "rulemakings." *See* Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1264-65 n.298 (1977). The courts, however, have not hesitated to apply § 2112(a) to rules as well as orders, and this Article will assume that no such distinction was intended. *See, e.g.*, Southland Mower Co. v. CPSC, 600 F.2d 12 (5th Cir. 1979); Westinghouse Elec. Corp. v. NRC, 598 F.2d 759 (3d Cir. 1979); United Steelworkers v. Marshall, 592 F.2d 693 (3d Cir. 1979); BASF Wyandotte Corp. v. Costle, 582 F.2d 108 (1st Cir. 1978); Industrial Union Dep't v. Bingham, 570 F.2d 965 (D.C. Cir. 1977).

[7] *See, e.g.*, FED. R. APP. P. 15(a); *id.* Form 3.

[8] *See, e.g.*, Tenneco Oil Co., Findings of Fact, Pursuant to Court Order, Concerning Filings of Petitions for Review of FERC Opinion Nos. 10 and 10-A, FERC Docket Nos. CI75-45, *et al.* (March 28, 1979); text accompanying notes 91-103 *infra*.

[9] 28 U.S.C. § 2112(a) (1976).

[10] *See* cases cited in note 88 *infra*.

[11] *See* text accompanying notes 153-58 *infra*.

[12] *See* text accompanying notes 128-49 & 169-200 *infra*.

[13] *See* text accompanying notes 162-68 *infra*.

[14] *See* text accompanying notes 159-61 *infra*.

[15] *See* note 89 *infra*.

[16] *See* United Steelworkers v. Marshall, 592 F.2d 693 (3d Cir. 1979).

purposes of judicial review, should greatly multiply the number of such simultaneous filings.[17] These cases raise the threshold question of which court should determine who won the race or, in the absence of any definitive mechanism for resolving that question, the appropriate forum for a hearing on the merits. The courts apparently decide this threshold question through informal private telephone communications among the judges of the affected circuits.[18] The designated court then either remands to the agency for further factfinding on the race issue[19] or decides which forum is appropriate under the "convenience of the parties in the interest of justice" test.

The experience of the agencies, lawyers, and courts under section 2112 (a) raises two important questions. First, is forum shopping in the context of multi-party appeals an appropriate activity for lawyers to engage in? Second, assuming forum shopping cannot or should not be avoided, is the section 2112(a) first-to-file rule the most appropriate way of regulating that activity? This Article concludes that forum shopping probably cannot and should not be avoided entirely. Virtually every rule that can be imagined for discouraging forum shopping can be avoided by imaginative counsel, and the multi-circuit review that results from forum shopping can aid the Supreme Court in performing its review functions. The first-to-file rule and its accoutrements, however, are definitely not the most appropriate mechanism for choosing among the available appellate courts. The Article suggests several alternative mechanisms and ultimately concludes that a simple automatic assignment mechanism, such as a lottery, would be greatly preferable to the current rule.

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[17] *See* Environmental Protection Agency, *Judicial Review Under Clean Water Act; Races to the Courthouse*, 45 Fed. Reg. 26,046 (1980) [hereinafter cited as *Final EPA Race Regulations*]; Federal Trade Commission, *Trade Regulation Rulemaking Procedures*, 44 Fed. Reg. 36,171 (1979). Race-to-the-courthouse designations in two individual agency rules have been upheld by the courts of appeals. Virginia Elec. & Power Co. v. EPA, 610 F.2d 187 (4th Cir. 1979); Southland Mower Co. v. CPSC, 600 F.2d 12 (5th Cir. 1979). Other race-to-the-courthouse regulations were recently promulgated by OSHA. 29 C.F.R. §§ 1911.12(a)(2), 1911.18(d) (1980).

[18] *See* Westinghouse Elec. Corp. v. NRC, 598 F.2d 759, 767 (3d Cir. 1979). *See also* Virginia Elec. & Power Co. v. EPA, 610 F.2d 187, 189 n.5 (4th Cir. 1979); United Steelworkers v. Marshall, 592 F.2d 693, 695 (3d Cir. 1979); American Pub. Gas Ass'n v. FPC, 555 F.2d 852, 857 (D.C. Cir. 1976).

[19] *See, e.g.*, Tenneco Oil Co., Additional Findings of Fact, Pursuant to Court Order, Concerning Filings of Petitions for Review of FERC Opinion Nos. 10 and 10-A, FERC Docket Nos. CI75-45 *et al.* (Sept. 20, 1979); Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 Am. U. L. Rev. 881, 909 (1975) (describing the race-to-the-courthouse factfinding process used in Environmental Defense Fund, Inc. v. EPA, 510 F.2d 1292 (D.C. Cir. 1975)).

I. Forum Shopping—An Analysis of the Problem

A. *Varieties of Forum Shopping*

The recent history of appeals from the Occupational Safety and Health Administration's (OSHA) standards for toxic chemicals provides an excellent example of forum shopping in operation. After OSHA's early standards for fourteen carcinogens,[20] asbestos,[21] and vinyl chloride[22] had been affirmed in all major respects by the Third, District of Columbia, and Second Circuits, respectively, lawyers for the petroleum industry sought to have OSHA's emergency temporary standard for benzene reviewed in the Fifth Circuit.[23] The affected union sought review in the District of Columbia Circuit.[24] The race to the courthouse, however, was complicated by the lack of a definitive starting gun. Agency officials met with industry and union officials between 9:30 and 10:00 a.m. on April 29, 1977 to announce the agency's decision. Immediately after this meeting the union petitioners filed a petition in the District of Columbia Circuit. Notice of the agency decision was not published in the *Federal Register* until May 3, 1977, and the industry petitioners filed their petition for review in the Fifth Circuit on May 10, 1977. The Fifth Circuit transferred the proceedings to the District of Columbia Circuit for a determination as to the appropriate circuit for a decision on the merits. In *Industrial Union Department v. Bingham,*[25] the District of Columbia Circuit panel split three ways on this threshold question.

Judge Fahy agreed with the agency that the regulations became effective at the end of the April 29 meeting.[26] Because the union was the first to file after that meeting, venue was proper in the District of Columbia Circuit unless the convenience of the parties or justice demanded transfer to the Fifth Circuit. Judge Fahy felt that the District of Columbia Circuit was most convenient to the parties and therefore saw no reason to transfer.[27]

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[20] Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 506 F.2d 385 (3d Cir. 1974), *cert. denied,* 423 U.S. 830 (1975); Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 503 F.2d 1155 (3d Cir. 1974), *cert. denied,* 420 U.S. 973 (1975).

[21] Industrial Union Dep't v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974).

[22] Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301 (2d Cir.), *cert. denied,* 421 U.S. 992 (1975).

[23] *See* Industrial Union Dep't v. Bingham, 570 F.2d 965 (D.C. Cir. 1977). It is not clear why the industry petitioners chose the Fifth Circuit, rather than any one of the other six available circuits. Because much of the petroleum industry is located in Fifth Circuit states, convenience may have been a factor. However, this does not explain why the American Petroleum Institute, a Washington, D.C.-based organization, would choose the Fifth Circuit; nor does it explain why Washington, D.C. counsel, who briefed and argued the case, would choose that circuit. More likely, that circuit's general pro-industry reputation, *see* note 42 *infra,* and its recent opinion in a case involving a related issue under a different statute, *see* Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831 (5th Cir. 1978), guided counsel in a southerly direction.

[24] *See* Industrial Union Dep't v. Bingham, 570 F.2d 965 (D.C. Cir. 1977).

[25] 570 F.2d 965 (D.C. Cir. 1977) (per curiam).

[26] *Id.* 976-79 (Fahy, J., dissenting).

Judge Leventhal agreed with Judge Fahy that the petition was first filed for the purposes of section 2112(a) in the District of Columbia Circuit and that it was the most convenient, pointing out that the parties all had counsel and other representatives in Washington, D.C.[28] Nevertheless, Judge Leventhal believed that "the interest of justice" required that the court transfer the case to the Fifth Circuit. Because the record disclosed that not all of the parties to the administrative proceedings were invited to the informal meeting of April 29, 1977, at least some parties were deprived of the opportunity to enter the race. To avoid the appearance of unfairness, Judge Leventhal voted to transfer.[29]

Judge Wilkey agreed with the industrial petitioners that the District of Columbia Circuit did not even have jurisdiction, because the union filed its petition prior to the time that the agency issued its order.[30] Judge Wilkey believed that the agency order had not been issued until it had been made available to the general public, which was subsequent to the filing of the union's petition.[31] The union's petition was therefore invalid, and the case belonged to the Fifth Circuit, where the only valid petitions had been filed. In order to avoid a complete impasse, however, Judge Wilkey speculated that had jurisdiction been proper in the District of Columbia Circuit he would have voted to transfer to the Fifth Circuit in accordance with Judge Leventhal's reasoning.[32] The case was therefore transferred.

The *Industrial Union* case might easily have had little practical impact, beyond providing an entertaining diversion for civil procedure dilettantes, had the Fifth Circuit simply followed existing precedents. That court, however, interpreted the agency's statute differently from the District of Columbia, Second, and Third Circuits, and it remanded to the agency for further proceedings.[33] The Supreme Court agreed to resolve the conflict in the circuits, and ultimately upheld the Fifth Circuit's remand.[34] In the meantime, given the split in circuits, the race to the courthouse for review of OSHA toxic substance standards assumed a much greater significance.

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[27] *Id.* 979-81. Judge Fahy concluded that the "interest of justice" language in 28 U.S.C. § 2112(a) (1976) simply elaborated upon the "convenience of the parties," and did not give the court independent grounds for transferring a case. *Id.* 979. *See* note 150 *infra.*

[28] 570 F.2d at 967-71 (opinion of Leventhal, J.).

[29] *Id.* 972.

[30] *Id.* 973-76 (opinion of Wilkey, J.).

[31] Judge Wilkey would have the race begin when "all affected parties have equal opportunity to gain actual knowledge of the agency action." *Id.* 976 (emphasis omitted).

[32] *Id.* 967 (per curiam).

OSHA's next standard, setting maximum workplace exposure levels for lead, predictably precipitated a frantic race to the Third and Fifth Circuits that ended in a dead heat.[35] The two courts conferred informally and decided that the Third Circuit should determine which court should hear the case on the merits.[36] Pointing out that "[u]nlike race tracks, . . . courts are not equipped with photoelectric timers,"[37] the court refused to decide which party actually filed first. After declining to use several other suggested transfer criteria and finding that neither party would be inconvenienced by review in either circuit, the court tossed the lighted squib to the District of Columbia Circuit. The court reasoned that because the District of Columbia Circuit would soon decide many of the same questions concerning the health effects of lead in the recently filed appeal from the Environmental Protection Agency's (EPA) ambient air quality standard for that element, that circuit was the logical court to take the lead.[38] The court recognized that no one had filed a petition for review in the District of Columbia Circuit, but insisted that this should not be determinative because most counsel were located in the District of Columbia in any event.[39] The parties' race thus left them at a somewhat unexpected finish line.

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[33] American Petroleum Inst. v. OSHA, 581 F.2d 493 (5th Cir. 1978), *aff'd sub nom.* Industrial Union Dep't v. American Petroleum Inst., 100 S. Ct. 2844 (1980).

The race chronicled here was theoretically for review only of OSHA's temporary emergency standard for benzene. The court as a practical matter eliminated that standard when on May 20, 1977, it issued a stay of that standard pending appeal. Because there was never a hearing on appeal, the stay was never lifted and the emergency temporary standard never went into effect. *See Occupational Exposure to Benzene,* 43 Fed. Reg. 5918, 5919 (1978). Petitions for review of the *final* benzene standard were filed in several circuits, but they were all transferred to the Fifth Circuit. American Petroleum Inst. v. OSHA, 581 F.2d at 500. The reasons for the transfer of these appeals were not published, but one can surmise that the Fifth Circuit's retention of jurisdiction over the appeal from the emergency temporary standard was an important factor. *See* text accompanying notes 137-49 *infra.*

[34] Industrial Union Dep't v. American Petroleum Inst., 100 S. Ct. 2844 (1980).

[35] United Steelworkers v. Marshall, 592 F.2d 693, 695 (3d Cir. 1979).

[36] *Id.*

[37] *Id.*

[38] *Id.* 697-98. The court might also have mentioned that the District of Columbia Circuit had gained some familiarity with lead-related issues in Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), *cert. denied,* 426 U.S. 941 (1976).

The foregoing example demonstrates that forum shopping comes in several varieties and can occur at several stages in the evolution of an administrative program. When the agency first issues an order, sets a national standard, or promulgates national regulations, there will generally be no controlling precedent in the circuit courts. An attorney for an aggrieved party can therefore choose from among the circuits where venue is proper.[40] The attorney may choose one circuit over another for a number of reasons, including the convenience of the lawyer, the convenience of the client, the inconvenience of the opponent, the status of the courts' dockets, or the attorney's perception that his or her client is more likely to prevail in one circuit than in another.[41] If, for example, the attorney plans to argue that the record support for the agency's decision is inadequate under the "arbitrary and capricious" or "substantial evidence" standards, the attorney might file the appeal in a circuit that he or she perceives to be less deferential toward administrative factfinding. Alternatively, the attorney might choose a circuit for its reported philosophical bent.[42] Fi-

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[39] 592 F.2d at 698.

[40] The attorney must look to the venue provisions of the agency's statute to ascertain the forums in which venue is proper. Usually, the statutes provide for venue in the District of Columbia Circuit or the circuit in which the aggrieved party resides or is conducting business. *See* 15 WRIGHT & MILLER, *supra* note 4, at § 3816. Occasionally, venue is proper exclusively in the District of Columbia Circuit.

If the applicable venue statute is sufficiently vague, a loser of a first-to-file race can sometimes preempt the application of § 2112(a) by arguing that venue is "inappropriate" in the first-filed circuit. *See, e.g.*, Dayton Power & Light Co. v. EPA, 520 F.2d 703 (6th Cir. 1975).

[41] *See generally* Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 382-90 (1975) [hereinafter cited as *Hruska Commission Report*].

[42] In Industrial Union Dep't v. Bingham, 570 F.2d 965 (D.C. Cir. 1977), for example, the union probably selected the District of Columbia Circuit because that circuit reputedly placed human health concerns on a higher footing than economic considerations. *See* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

Over sufficient periods of time, the courts of appeals acquire reputations among practicing attorneys that guide them either toward or away from particular circuits in particular kinds of cases. For example, rumor has it that on environmental questions the District of Columbia Circuit and First Circuit generally tend to favor the agency, while the Fourth and Fifth Circuits are generally more "pro-business." *See* Klement, *Agencies Look for Trigger to Courthouse Race*, Nat'l L.J., Aug. 6, 1979, at 7, col. 1; Ross & Goldman, *Racing to the Court: An "Unseemly" Way to Challenge Agency Orders*, Nat'l L.J., March 3, 1980, at 27, col. 1; *cf.* DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 281 n.126 (1979) (comparing District of Columbia and Fifth Circuits). The reading of the circuits' predilections, of course, depends heavily on the nature of the action being reviewed. For many agencies, the District of Columbia Circuit nally, if the client is a major industry that is concentrated in a particular geographical area, the lawyer might shop for the circuit encompassing that area because of his or her perception that the court will be more favorably inclined toward the local client.

After one court has ruled on a question of law or fact involving a given administrative program, lawyers in future litigation involving the same program will have a greater incentive to forum shop.[43] The lawyer who now has a favorable precedent in one circuit will of course attempt to have his or her appeal heard in that circuit. The incentive will be especially strong if the previous court ruled for or against the agency on a question of statutory interpretation or procedural implementation, because the former court can be expected to follow the "law of the circuit" and reaffirm its prior holding.[44] The incentive should be somewhat weaker if the prior decision simply tested the record support for an agency's factual premises and inferences under the "substantial evidence" or "arbitrary and capricious" tests. A prior holding that

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appears to be the *least* likely circuit to uphold agency action. *See, e.g., Hruska Commission Report, supra* note 41, at 383-84, 387 (statements of general counsels of Comptroller of the Currency and General Service Administration). Finally, a court's approach to a particular agency action may depend more upon the court's philosophical view as to the merits of the action than upon its legal approach to judicial review of administrative action, and courts acquire reputations for philosophical outlooks as well as for deference to agency action or lack thereof.

Whether or not judicial performance warrants these general perceptions is not directly relevant. *See generally* Lang & Thomas, *Disposition of Patent Cases by Courts During the Period 1939-1949*, 32 J. PAT. OFF. SOC'Y 803 (1950) (tabulating patent cases by circuit); Comment, *Forum-Shopping in the Review of NLRB Orders*, 28 U. CHI. L. REV. 552 (1961); Comment, *Forum-Shopping in Appellate Review of FTC Cease and Desist Orders*, 1968 UTAH L. REV. 316. The incentive to forum shop is based upon perceptions, not reality. This author has collected sufficient evidence to suggest that attorneys do in fact forum shop on the basis of their perceptions of the general tendencies of the various circuits. He sent a letter to 62 attorneys who were listed as attorneys of record in cases involving races to the courthouse or involving large national environmental and energy cases in which forum shopping was possible. Confidentiality was assured the recipients. Of the 18 relevant responses, 17 stated that in choosing a forum for review they relied upon their perceptions that their clients' interests were more likely to prevail in the forums of their choice. Fifteen called this the most significant factor in their choice. Only seven stated that they considered either their convenience or the convenience of their clients in choosing from among the circuits, and seven stated categorically that convenience was *not* a consideration. Notes on file with author.

[43] In one, perhaps extreme, example a petitioner established a place of business in the Seventh Circuit solely to take advantage of a favorable prior precedent. Gerson v. FTC, 325 F.2d 93, 94 n.2 (7th Cir. 1963).

[44] *See* Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406 (1972); Vestal, *Relitigation by Federal Agencies: Conflicts, Concurrence and Synthesis of Judicial Policies*, 55 U.N.C. L. REV. 123, 161 (1977). The attorney, of course, cannot have absolute assurance that the panel of the circuit court that he or she draws will follow the holding of the former panel. *See generally* Wasby, *Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343 (1979).

an agency's decision either has or lacks sufficient record support is not a particularly strong indicator of how another panel of the circuit will view the record support for a different decision by the same agency. Yet the language of the court's opinion may give some indication of the degree to which the court is willing to demand that the agency explain itself. This, in addition to the general reputation of the courts discussed earlier,[45] may provide sufficient incentive to choose one court over another.

The attorney in a later case representing a client who disagrees with the first appellate court's holding will have a similar incentive to avoid the former forum; this type of forum shopping might more appropriately be labeled "forum avoidance." Although intercircuit disputes on questions of law are not uncommon,[46] prior precedents in one circuit are likely to be followed in other circuits,[47] and the attorneys in later cases will thus have less incentive to forum shop than their predecessors had. Nevertheless, as the American Petroleum Institute learned in the benzene case,[48] the potential rewards may justify the extra expense, even if the chances for victory are low. When the prior court only examined the record support of the agency's conclusions, however, the incentive to avoid that circuit may not be as high, especially if the former holding runs contrary to the court's general reputation.

B. *The Policies For and Against Forum Shopping*

1. Disadvantages of Forum Shopping

a. *Public Image of Lawyers and Courts*

The spectacle of a race to the courthouse may detract somewhat from the public image of the judicial system as an impartial and consistent dispenser of justice. Hence, blatant attempts to select forums are often condemned as "unseemly."[49] Yet, because races to the courthouse and other more subtle attempts to forum shop rarely claim much, if any, media attention outside of the specialized legal press, this fear may be somewhat overblown.

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[45] *See* note 42 *supra.*

[46] *See* Vestal, *supra* note 44, at 162.

[47] *See id.* 165-66.

[48] American Petroleum Inst. v. OSHA, 581 F.2d 493 (5th Cir. 1978), *aff'd sub nom.* Industrial Union Dep't v. American Petroleum Inst., 100 S. Ct. 2844 (1980).

[49] *See, e.g.,* Wearly v. FTC, 616 F.2d 662, 664 n.1 (3d Cir. 1980); Industrial Union Dep't v. Bingham, 570 F.2d 965, 970 (D.C. Cir. 1977) (opinion of Leventhal, J.); Rayco Mfg. Co. v. Chicopee Mfg. Corp., 148 F. Supp. 588, 592-93 (S.D.N.Y. 1957); Leventhal, *supra* note 19, at 909 ("Discussion often castigates 'unseemly' forum shopping, although I have never seen a reference to 'seemly' forum shopping."); Ross & Goldman, *supra* note 42, at 27; Vestal, *supra* note 44, at 165.

b. *Judicial Comity*

When two courts are presented with the opportunity to review the same administrative order, judicial comity demands that one court yield to the other.[50] The doctrine of judicial comity is thus designed to prevent "unseemly conflict" among the courts.[51] But the doctrine does not always specify which court shall yield. Forum shopping attempts can therefore threaten the carefully nurtured goodwill that exists among the federal appellate courts. An extreme example of a threat to judicial comity caused by forum shopping is *Montship Lines, Ltd. v. FMB*,[52] in which petitions for review of a Federal Maritime Board order were filed in the Second and District of Columbia Circuits. The first petition was filed in the District of Columbia Circuit, and the agency filed a certified appendix of the record in that circuit. Nevertheless, the Second Circuit upheld the order before the District of Columbia Circuit had ruled on the matter.[53] The District of Columbia Circuit, taking note of the Second Circuit decision, assumed jurisdiction and vacated the order. The court did not explain why the Second Circuit holding was not res judicata; it held only that the question of the Second Circuit's jurisdiction was not before it.[54]

For obvious reasons the courts of appeals would prefer that they not be forced into the position of issuing orders that directly conflict with those of sister courts or that effectively govern proceedings in other circuits. Because federal agencies often take actions that are appropriate for review in more than one circuit, forum shopping for review of administrative action can be a particularly potent threat to judicial comity.[55] With a few exceptions, such as the case discussed above, however, the federal first-to-file statute[56] has avoided threats to judicial comity, because it specifies precisely which court shall take jurisdiction. Yet, the recent wave of cases involving simultaneous filings[57] has renewed the threat to judicial comity. Thus far, courts of appeals have been able to work out privately the court that decides which court shall hear the merits of controversies involving simultaneous filings.[58] That informal approach may become increasingly strained in the future as simultaneous filings begin to occur in more than two circuits.[59]

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[50] *See, e.g.*, Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952). *See also* GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 100 S. Ct. 1194, 1202 n.11 (1980).

[51] Valley Vision, Inc. v. FCC, 383 F.2d 218, 219 (D.C. Cir. 1967).

[52] 295 F.2d 147 (D.C. Cir. 1961).

[53] Kerr S.S. Co. v. United States, 284 F.2d 61 (2d Cir. 1960), *vacated as moot*, 369 U.S. 422 (1962).

[54] 295 F.2d at 151. *See also* Environmental Defense Fund, Inc. v. EPA, 485 F.2d 780 (D.C. Cir. 1973) (District of Columbia Circuit orders parties to proceedings in Northern District of Mississippi to move for immediate dismissal in that court so that proceedings may be heard in their entirety in the District of Columbia Circuit).

[55] *See, e.g.*, Consumers Union of United States, Inc. v. CPSC, 590 F.2d 1209 (D.C. Cir. 1978) (even though District of Delaware enjoined agency from releas-

c. *Uniform Application of Agency Policy*

Forum shopping can threaten agency attempts to apply policy uniformly across the country.[60] The most immediate impact of forum shopping on an agency's decisionmaking process is the effect on the agency of the knowledge that its action may well be reviewed by the least sympathetic of all of the federal courts. For administrative factfinding and inference-drawing this effect may be altogether salutary. Careful agency analysis is generally a thing to be encouraged, and the courts of appeals are in any event usually disinclined to substitute their judgments for that of the agency on questions of factual inference. For questions involving statutory interpretation and the implementation of broad statutory policies, however, the knowledge that an unsympathetic court might inter-

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ing data, District of Columbia district court could order agency to release the same data), *rev'd sub nom.* GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 100 S. Ct. 1194 (1980).

[56] 28 U.S.C. § 2112(a) (1976).

[57] *See* cases cited in note 206 *infra.*

[58] *See* text accompanying notes 209-10 *infra.*

[59] The conflict predicted has in fact recently arisen in the context of a jurisdictional squabble between the Fourth and District of Columbia Circuits. Petitions for review of certain EPA regulations were filed simultaneously in the Fourth, Fifth, and District of Columbia Circuits. Faced with the task of deciding which circuit would hear the petitions, the three circuits conferred informally and decided to settle the question by lot. The Fourth Circuit was chosen. *See* National Resources Defense Council, Inc. v. EPA, 15 ENVIR. REP. (BNA) 1157 (D.C. Cir. 1980). The District of Columbia Circuit, however, apparently refused to be bound by the results of the lottery and broke off negotiations. *See* Virginia Elec. & Power Co. v. EPA, Nos. 79-1347 *et al.* (4th Cir. Oct. 16, 1980) (unpublished order). Miffed, the Fourth Circuit went ahead and assumed jurisdiction. *See id.* The District of Columbia Circuit nonetheless ignored the Fourth Circuit order cited *supra*, assumed jurisdiction, and in a lengthy opinion issued in November, 1980, explained why it and not the Fourth Circuit should hear the case. *See* National Resources Defense Council, Inc., 15 ENVIR. REP. at 1157-64. Thus, the matter is being adjudicated before two circuits, each refusing to give way to the other.

[60] *See, e.g.*, Dayton Power & Light Co. v. EPA, 520 F.2d 703, 708 (6th Cir. 1975); Natural Resources Defense Council, Inc. v. EPA, 465 F.2d 492, 495 (1st Cir. 1972). *See also* Currie & Goodman, *supra* note 3, at 65-66.

pret its statute differently may cause the agency to be unduly timid in implementing its statutory mandate.[61]

Even if an agency chooses to implement forcefully its mandate and risk a legal challenge in a potentially unfriendly circuit, a successful defense before the court does little to ensure the evolution of a uniform policy. Other parties in later litigation can race to different circuits to obtain conflicting interpretations. In this age of the "polycentric" administrative dispute,[62] the ability to forum shop may leave the law unsettled until the Supreme Court decides the issue, which in many cases can be a substantial length of time. Particularly when the agency is facing statutorily imposed deadlines, this uncertainty can defeat the successful implementation of national policy.[63] The OSHA experience is once again a good example. After OSHA's approach to regulating toxic chemicals in the workplace had survived appeals in three circuits,[64] the agency sought to solidify some of the principles that had been announced in those cases in a generic carcinogen regulation. OSHA anticipated that the generic regulations would eliminate the need to litigate certain questions, such as the validity of extrapolating from laboratory animals to humans,[65] on a case-by-case basis. In the midst of the rulemaking proceeding on the generic regulations, however, the Fifth Circuit, following a classic race to the courthouse, ruled that OSHA's former approach did not comply with the statute.[66] This holding, of course, cast a pall upon the generic carcinogen effort, and the new issues raised by the Fifth Circuit litigation slowed down the rulemaking process considerably.

Fortunately, the Supreme Court has been diligent in detecting conflicts among the circuits on questions of statutory interpretation involving nationally applicable administrative standards, and it has granted certiorari in most of the important recent cases.[67] If the Court continues this practice, agencies and litigants will at least have some assurance that administrative programs will not remain in flux indefinitely. Even this, however, may not be enough when the agency is operating under a statutory deadline. For example, although the District of Columbia Circuit in 1975 strongly intimated that EPA had authority to promulgate uniform national effluent limitations for categories of existing industrial sources mandating the application of the best practicable technology economically achievable by July 1, 1977,[68] the Eighth Circuit held that EPA had no such authority.[69] EPA nevertheless adhered to its original position and received favorable rulings on this point from six other circuits[70] before the Supreme Court finally granted certiorari in one of the cases and ruled in EPA's favor.[71] It was thus not until February 23, 1977—five months before the technology was to be in place—that EPA's authority was definitively established. Because EPA had not always insisted during the pendancy of the litigation that its uniform guidelines be incorporated into industrial-waste discharge permits, it was impossible for many of the sources to comply with the 1977 deadline.[72] Congress ultimately amended the Act to give those companies that had been litigating this issue with EPA until April, 1979 to comply with the national effluent limitations.[73]

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[61] The author recalls many instances during his stint with the Environmental Protection Agency, Office of General Counsel, in the mid-1970s in which agency lawyers evaluated a regulation to determine whether it would survive review in the Fourth Circuit, the court perceived to be the most hostile forum for review of EPA regulations.

[62] *See* Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues,* 71 MICH. L. REV. 111, 116-20 (1972).

[63] *See* Pan Am. World Airways, Inc. v. CAB, 517 F.2d 734, 741 (2d Cir. 1975); *Hruska Commission Report, supra* note 41, at 382-87.

[64] *See* notes 20-22 *supra* & accompanying text.

[65] The Third Circuit had opined that the mouse-to-man extrapolation problem was "a legal rather than a factual determination." Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 503 F.2d 1155, 1159 (3d Cir. 1974), *cert. denied,* 420 U.S. 973 (1975).

[66] American Petroleum Inst. v. OSHA, 581 F.2d 493 (5th Cir. 1978), *aff'd sub nom.* Industrial Union Dep't v. American Petroleum Inst., 100 S. Ct. 2844 (1980).

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[67] *See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 100 S. Ct. 2844 (1980); United States v. Ward, 100 S. Ct. 2636 (1980); E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977); Union Elec. Co. v. EPA, 427 U.S. 246 (1976); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975).

[68] Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975).

[69] CPC Int'l v. Train, 515 F.2d 1032 (8th Cir. 1975).

[70] American Petroleum Inst. v. EPA, 540 F.2d 1023 (10th Cir. 1976), *cert. denied,* 430 U.S. 922 (1977); American Frozen Food Inst. v. Train, 539 F.2d 107 (D.C. Cir. 1976); Hooker Chem. & Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976); E.I. du Pont de Nemours & Co. v. Train, 541 F.2d 1018 (4th Cir. 1976), *aff'd in relevant part,* 430 U.S. 112 (1977); American Meat Inst. v. EPA, 526 F.2d 442 (7th Cir. 1975); American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975).

[71] E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977).

[72] During this time, EPA and the states that had permit-writing authority had been issuing permits pursuant to 33 U.S.C. § 1342(a)(1) (1976), which allowed the permitting authority, prior to implementation of the national effluent limitations, to apply "such conditions as the Administrator determines are necessary to carry out the provisions of this Act." *See* W. RODGERS, ENVIRONMENTAL LAW § 4.11 (1977). Each permitting action, however, could be appealed to the Administrator for an adjudicatory hearing, and ultimately for review in a court of appeals, *see* Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977); United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977), where the technological questions that were settled in the litigation over the national standards could be relitigated on a case-by-case basis. Not surprisingly, many of the permits issued during the interim period were not as stringent as the national effluent limitations would have required. *See* La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes,* 62 IOWA L. REV. 771, 822 (1977).

d. *Business Uncertainty*

Forum shopping for review of questions of law can produce an environment of uncertainty that may discourage businesses from investing capital in productive enterprises.[74] Once a court of appeals has decided a nationally applicable question of law, individual companies affected by that ruling understandably would like to rely on the holding in making future business decisions. They cannot confidently prepare for the future, however, if there is a strong possibility that the agency, a competitor, union, or public interest group might obtain a contrary ruling from another court of appeals sometime in the future. For important questions of national energy, environmental and health policy, and, to a more limited extent, labor policy, the uncertainty generated by the possibility of future inconsistent holdings might have detrimental consequences for investment on a national scale.

The effects of forum shopping on business uncertainty should not, however, be exaggerated. The amount of additional uncertainty due to the possibility that courts of appeals will reach inconsistent decisions on questions of law may not be great when compared to the uncertainty due to other business imponderables.[75] Indeed, a business always faces the risk, entirely unrelated to forum shopping, that Congress will reverse a court of appeals ruling by amending the agency's statute. In volatile regulatory areas, such as energy and environmental regulation, this risk is easily as great as the risk of conflicting appellate decisions. Finally, such business risks are most likely to result from forum shopping to secure review of questions of law. Given the greater degree of deference accorded by the appellate courts to agency findings of fact, the chance of significant differences in appellate review of administrative factual determinations is relatively remote.

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[73] Clean Water Act § 309(a)(5)(B), Pub. L. No. 95-217, § 56(c), 91 Stat. 1593 (1977) (codified at 33 U.S.C. § 1319(a)(5)(B) (Supp. III 1979)). *See* Monongahela Power Co. v. EPA, 586 F.2d 318 (4th Cir. 1978). Similar delay in securing judicial review of EPA's recently promulgated rules for implementing the National Pollution Discharge Elimination System permit-granting process threatens successful implementation of that program. *See* Sive, *EPA Water Pollution Rules: Stuck In a Multiple Review Bottleneck,* Nat'l L.J., March 10, 1980, at 25, col. 1. A similar fate may await OSHA's new carcinogen rules. *See* [1980] 3 CHEM. REG. REP. (BNA) 1874.

[74] *See* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law,* 82 HARV. L. REV. 542, 597 (1969) ("To the extent that circuits seem to offer the planner different results, ventures that are only marginal on an economic assessment are overlaid with unresolvable confusion."); Leventhal, *supra* note 19, at 896; Pierce, *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy,* 31 HASTINGS L.J. 1, 21-27 (1979) (detailing the costs to society of business uncertainty due to delay in resolving crucial national energy issues).

[75] *See* H. RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY 27-32 (1968).

e. *Costs of Forum Shopping*

Forum shopping costs money. Under the current first-to-file statute, parties spend much time and money on the walkie-talkies and other arcane paraphernalia necessary to pursue their elaborate races to the courthouse. Once the race is complete the parties frequently consume additional resources litigating over who won the race. In the case of simultaneous filings, and in any alternative system that relies upon a balancing of criteria to determine the appropriate circuit, the parties must consume further time and energy debating the correct balance of the relevant factors. One can justifiably question the fairness and efficacy of a system that demands costly expenditures for the rendering of threshold determinations, irrelevant to the merits of the case, especially in situations in which one party can ill-afford the cost.[76] In addition to the drain on client resources, forum shopping consumes the judicial and agency resources that must go into administering the forum shopping mechanism. Finally, forum shopping on questions of law can result in two or more courts devoting valuable judicial resources to duplicative efforts.[77]

2. The Advantages of Forum Shopping

Despite its numerous costs, forum shopping has two offsetting advantages. For questions of law and for some generally applicable questions of procedure, forum shopping can provide the Supreme Court with the opportunity to observe how several circuit court judges have resolved difficult questions before deciding them for itself. For example, the Supreme Court in deciding that EPA had authority to set national effluent limitations under the Clean Water Act[78] noted "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals."[79] Similarly Judge Leventhal has suggested that "[t]here are advantages of multiple judicial input on issues. This is a concept of feedback, of a simmering or percolating effect."[80] Other commentators have likewise stressed the value of creative conflicts among the circuits.[81] Additionally, the conflict in the circuits that can result from forum shopping can be a very effective signal to the Supreme Court that an important issue needs its attention.[82] Forum shopping on legal and perhaps procedural questions can thus benefit the legal process. The extent to which the "percolation" and signaling advantages of forum shopping outweigh its significant disadvantages is an overriding question to be addressed in connection with the following critical analysis of the current first-to-file rule and the possible alternatives for reform.

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[76] *See* note 114 *infra* & accompanying text.

[77] *See* Natural Resources Defense Council, Inc. v. EPA, 465 F.2d 492, 495 (1st Cir. 1972) ("[W]e do not feel that judicial manpower is so abundant so [*sic*] as to permit several circuits to solve identical complex legal and factual issues . . . .").

[78] *See* text accompanying notes 68-73 *supra.*

II. Current Practice Under Section 2112 (a)

Before 1958, an agency's ability to file the record in a court of appeals gave it the practical power to choose which of the available circuits would hear the appeal.[83] In 1955, however, the Committee of Revision of the Laws of the Judicial Conference of the United States proposed to limit the agency's discretion by requiring that the record be filed in the circuit "in which in its judgment the proceedings may be carried on with the greatest convenience to all the parties involved."[84] After the American Bar Association and several agencies complained that this would still give agencies too much discretion,[85] Congress enacted section 2112(a),[86] which provides that the record shall be filed in the circuit in which the first petition was filed. That circuit may in turn transfer the proceedings to any other court of appeals "[f]or the convenience of the parties in the interest of justice."[87] The courts of appeals have, in addition, recognized an "inherent power" in a court of appeals to transfer a case to another court of appeals irrespective of any statutory authority.[88] In the typical case, however, the circuit in which the first petition is filed will hear the merits of the appeal,[89] a prospect that has precipitated vigorous and wasteful races to the courthouse.[90]

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[79] E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977). *See also Circuit Clash Heartens EPA Air Enforcers*, Legal Times of Washington, Aug. 20, 1979, at 17, col. 1.

[80] Leventhal, *supra* note 19, at 908 (footnote omitted).

[81] *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 186 (1973) [hereinafter cited as GENERAL VIEW]; Currie & Goodman, *supra* note 3, at 69; *Hruska Commission Report*, *supra* note 41, at 219; Oakes, *Developments in Environmental Law*, [1973] 3 ENVT'L L. REP. (ELI) 50,001, 50,011. *But see* Note, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals*, 87 YALE L.J. 1219, 1245 (1978) ("It is not at all clear, however, that conflict consistently produces such synthesis. In regulatory law—much concerned, as it is, with detail—conflict is likely to create confusion among lawyers, clients, and the judiciary.").

[82]
> So long as the Supreme Court is relied on to be the final arbiter of the interpretation of regulatory statutes, conflicts are a good thing—not a bad one. They point up the areas where there are grounds for reasonable differences of opinion and flash a signal to which the Court must ultimately respond.

Remarks by Henry Friendly, Appellate Judges' Conference, A.B.A. Convention (Aug. 4, 1968), *reprinted in* CASE & COMMENT, March-April, 1969, at 23, 25. *See also* GENERAL VIEW, *supra* note 81, at 187. These advantages of forum shopping are less obvious in cases in which the only issue is the sufficiency of the record support for the agency's factual determinations. Differing appellate court holdings on diverse factual determinations can have little educational value for the Supreme Court; nor can they effectively signal the need for Supreme Court review of agency factfinding and inference-drawing.

[83] *See* Ball v. NLRB, 299 F.2d 683, 687 (4th Cir.), *cert. denied*, 369 U.S. 838 (1962) (detailing the legislative history of 28 U.S.C. § 2112(a) (1976)); 16 WRIGHT & MILLER, *supra* note 4, § 3944, at 332; Comment, *A Proposal to End the Race to the Court House in Appeals from Federal Administrative Orders*, 68 COLUM. L. REV. 166, 168-69 (1968).

One of the most bizarre and expensive courthouse races occurred in an appeal from a recent Federal Energy Regulatory Commission (FERC) decision, *Tenneco Oil Company*.[91] On June 21, 1978 FERC issued an opinion denying applications for rehearing on requests by several interstate pipelines for authorization to transport natural gas produced in the offshore federal domain to several onshore gas consuming facilities.[92] Petitions for review were filed in the Fifth and District of Columbia Circuits at approximately 3:02 p.m. EDT. The Fifth Circuit, pursuant to its own rules of procedure,[93] referred the matter to FERC for findings as to which party filed first.[94] Holding that the ultimate finding of who won the race "is a question that must ultimately be resolved by the courts of appeals," the Commission ordered the Administrative Law Judge (ALJ) "to conduct such proceedings as he considers necessary" and to file a report to the Commission.[95]

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[84] H.R. 6682, 84th Cong., 1st Sess. § 2 (1955), *reprinted in Appeal of Administrative Agency Decisions: Hearings on H.R. 6682 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. 1 (1956).

[85] *See* Fels, *Beyond the Stopwatch: Determining Appellate Venue on Review of FERC Orders*, 1 ENERGY L.J. 35, 38-39 (1980); Comment, *supra* note 83, at 168-69.

[86] Pub. L. No. 85-791, § 2, 72 Stat. 941 (1958), *as amended by* Pub. L. No. 89-773, § 5(a), 80 Stat. 1323 (1966) (codified at 28 U.S.C. § 2112(a) (1976)).

[87] *Id.*

[88] *See, e.g.*, Pearce v. Director, Office of Workers' Compensation Programs, 603 F.2d 763, 771, n.3 (9th Cir. 1979) (collecting the cases by circuit); Dayton Power & Light Co. v. EPA, 520 F.2d 703, 708 (6th Cir. 1975); Farah Mfg. Co. v. NLRB, 481 F.2d 1143, 1145 (8th Cir. 1973); 15 WRIGHT & MILLER, *supra* note 4, § 3816, at 102 n.6.

This Article will refer to transfers under either the power explicitly granted by § 2112(a) or a court's inherent power to transfer as "discretionary transfer."

[89] In most cases the loser of the race apparently concedes, and the litigation proceeds in the circuit of first filing. When discretionary transfers have been requested the requests have been granted approximately one-half of the time. *See* note 152 *infra*.

[90] At least one loser has argued that § 2112(a) should be read so as to make the filing of multiple petitions "simultaneous" if occurring on the same day. *See* Ball v. NLRB, 299 F.2d 683, 686 (4th Cir.), *cert. denied*, 369 U.S. 838 (1962). Such a reading would substantially reduce the possibility of inordinately hectic races, although it may create a well-nigh intolerable threat to judicial comity because petitions could be filed in several circuits. *See* notes 50-58 *supra* & accompanying text. In any case, this idea was rejected early on in favor of the current "hour and minute" (and "second") rule. *See* Ball v. NLRB, 299 F.2d at 686-87.

[91] FERC Docket Nos. CI75-45, *et al.*

The ALJ gamely followed these instructions, and held three days of hearings at FERC headquarters, the District of Columbia Circuit courthouse and the Fifth Circuit courthouse, during which the parties reenacted the race.[96] According to the ALJ's findings, Tenneco had a five-person line-of-sight human chain from the FERC offices on the first floor to an open telephone line on the second floor. Three reenactments of the sequences resulted in findings of 2.11, 1.16, and 0.95 seconds for this link in the chain.[97] At the other end of the telephone line, Tenneco maintained a two-man chain to await the signal in the federal courthouse in New Orleans.[98] Another petitioner, Air Products, took the Commission at its word that it would release its decision at precisely 3:00 p.m. EDT and filed a petition in the Fifth Circuit at 3:01 p.m. EDT, prior to the signal from Tenneco's human chain.

The Public Service Commission of the State of New York, which was racing to the District of Columbia Circuit, prepared two human chains, one being a subterfuge to confuse the timing of Tenneco's chain. After three trial runs the ALJ calculated that the Public Service Commission's chain, which ran across a courtyard to another building, consumed between 1.36 and 1.84 seconds.

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[92] Tenneco Oil Co., FERC Docket Nos. CI75-45, *et al.*, Opinion No. 10A, (June 21, 1978).

[93] *See* 5th Cir. R. 11.5.

[94] Air Prods. & Chem., Inc. v. FERC, No. 78-2011 (5th Cir. Oct. 30, 1978) (per curiam order). The District of Columbia Circuit acquiesced in this procedure. Public Serv. Comm'n v. FERC, No. 78-1573 (D.C. Cir. Nov. 8, 1978) (per curiam order).

[95] Tenneco Oil Co., Order Establishing Additional Proceeding Pursuant to Court Order 3, FERC Docket Nos. CI75-45, *et al.* (Nov. 20, 1978).

[96] Tenneco Oil Co., Findings of Fact, Pursuant to Court Order, Concerning Filings of Petitions for Review of FERC Opinion Nos. 10 and 10-A, FERC Docket Nos. CI75-45, *et al.*, at 2 (March 28, 1979).

[97] *Id.* app. 4.

[98] *Id.* app. 5.

Another chain at the District of Columbia Circuit courthouse relayed the message to a Public Service Commission operative at the District of Columbia Circuit timeclock.[99]

The ALJ set forth the above factual findings and the Commission adopted them. The Fifth Circuit, however, was dissatisfied with the Commission's action, because the Commission had made findings accurate to the second with respect to only one party. The court, therefore, remanded once again to the Commission for "to-the-second" findings for both parties and an ultimate finding as to which party filed first.[100] The Commission referred the matter back to the ALJ,[101] who responded with an elaborate chart that related the events to the hundredth of a second.[102] Because Tenneco had begun its process slightly before the order had been stamped in the FERC office, the ALJ found that Tenneco won the race, although he admitted that his conclusion was "based more on perception and probability than upon any demonstrable fact." [103]

A. *The Cost of the Race*

The mere telling of this tale vividly demonstrates one of the major failings of the first-to-file rule as currently administered—it is a foolish waste of judicial, administrative, and client resources. The Office of the Federal Register has in fact complained that the presence of lawyers in its offices waiting for some race or another to begin interferes with its work.[104] A conservative estimate of the expenses of a more recent race for review of a FERC order yields a cost to clients of $65,000.[105] To this must be added the expense to the government of administrative and judicial hearings on who won the race and on the threshold transfer issue. The litigation costs to both parties and the government could thus easily exceed $100,000 in a typical case. That other circuits do not appear to be as insistent as the Fifth Circuit that the agencies determine the winner of the race with split second accuracy,[106] reduces these latter expenditures somewhat in those circuits. Nevertheless, the cost to clients continues to climb as racing techniques grow increasingly sophisticated.

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[99] *Id.* app. 5-7.

[100] Air Prods. & Chem., Inc. v. FERC, No. 78-2011 (5th Cir. July 19, 1979) (per curiam order).

[101] Tenneco Oil Co., Order Remanding Proceeding to Administrative Law Judge for Supplemental Report, FERC Docket Nos. CI75-45 *et al.* (Aug. 16, 1979).

[102] Tenneco Oil Co., Additional Findings of Fact, Pursuant to Court Order, Concerning Filings of Petitions for Review of FERC Opinion Nos. 10 and 10-A, FERC Docket Nos. CI75-45, *et al.*, at app. 3-4 (Sept. 20, 1979).

[103] *Id.* app. 5. For other recent accounts of this race, see Cook, *Racing to the Courthouse: Is Justice Left Behind?*, INDUSTRY WEEK, May 26, 1980, at 44; Fels, *supra* note 85, at 35-36.

[104] *See Final EPA Race Regulations, supra* note 17, at 26,047 n.5.

[105] The race, as related to the author by one of the participants, involved three racers—two to the Fifth Circuit and one to the District of Columbia Circuit. Both Fifth Circuit petitioners maintained open conference telephone lines to the Fifth and District of Columbia Circuits from FERC headquarters. Both had two paralegals and one part-time lawyer in New Orleans, one paralegal and two part-time lawyers at FERC headquarters, and one paralegal at the District of Columbia Circuit for nine hours a day for ten working days. The District of Columbia peti-

B. *The Fairness of the Race*

If races-to-the-courthouse are allowed to determine the appropriate forum for the appeal, it is necessary to ensure that the race be conducted fairly. The need for fairness occasionally requires the courts to act as referees. For example, in the previously described race-to-the-courthouse for review of OSHA's benzene standard,[107] Judge Leventhal cast the deciding vote in favor of transfer from the circuit of first filing to the Fifth Circuit because he believed that the Assistant Secretary's private meeting with the union and several industry representatives—before making her decision available to the rest of the parties and the general public—gave some parties an unfair head start.[108]

Agency service by mail poses additional fairness problems, because it gives an inherent advantage to the parties living closest to

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tioner maintained one paralegal and one part-time lawyer at FERC headquarters and at the District of Columbia Circuit, and an open local telephone line between the two points. Because the Fifth Circuit ruled that an appeal was not ripe until after the agency had ruled on a motion for rehearing, the race had to be run once again. The second time, however, only one Fifth Circuit petitioner raced and the parties were required to be prepared for only four working days.

[106] In United Steelworkers v. Marshall, 592 F.2d 693 (3d Cir. 1979), the court ruled that petitions that were filed within the same minute were simultaneously filed, despite arguments that one petition was filed ten seconds earlier than the other. *See also* American Pub. Gas Ass'n v. FPC, 555 F.2d 852 (D.C. Cir. 1976) (court accepts agency's finding that the petitions were filed simultaneously); Municipal Distribs. Group v. FPC, 459 F.2d 1367, 1368 (D.C. Cir. 1972) ("We are by no means confident that the difference of two seconds in the stamped filing time of the petitions . . . is sufficiently meaningful to establish the automatic application of the mandate of 28 U.S.C. § 2112(a) . . . ."); International Union of Elec. Radio & Mach. Workers v. NLRB, 343 F.2d 327, 329 (D.C. Cir. 1965) (court accepts agency's conclusion that neither party can be said to be the first to file). *But see* Abourezk v. FPC, 513 F.2d 504, 505 (D.C. Cir. 1975) (even though time stamps on pleadings indicated that clocks of the courthouses were not accurate enough to determine winner of race, litigants entitled to "an examination delving beyond the four corners of the pleadings").

[107] *See* text accompanying notes 20-39 *supra*.

[108] Industrial Union Dep't v. Bingham, 570 F.2d 965, 972-73 (D.C. Cir. 1977) (opinion of Leventhal, J.).

Washington, D.C.[109] Similarly, mail service poses the ever-present possibility of a mail mix-up that penalizes one party through no fault of its own. In *International Union of Electrical, Radio and Machine Workers v. NLRB,*[110] for example, the agency, following standard procedure, announced its decision by mail. Some copies were to be sent by registered mail and others were to be sent by first class mail. Although both sets of letters were delivered to the agency's mail room at the same time, the Postal Service inexplicably picked up the first class mail on one day and the registered mail on the next. The union, which was on the first class mailing list, consequently received its copy of the decision before the parties on the registered mail list and filed the first petition for review. Rejecting the company's contention that the unfairness of the notification procedure required transfer to another circuit, the court agreed with Judge Wilkey's opinion in *Industrial Union Department v. Bingham*[111] that there is no practical way to ensure that all parties are informed simultaneously:

> What the appearance of justice requires is that the notification procedure utilized be one fairly designed to afford affected parties an *equal opportunity* to gain adequate knowledge of the agency action. The first class mail service in these cases did not in fact result in actual notice of the Board's decision to all parties at the same time, but it would be inaccurate to say that the opportunities were skewed from the outset.[112]

The court thus apparently concluded that if a notification mechanism is not inherently biased in favor of a single participant, a court will not inquire into its unfair application in individual cases. While this is perhaps justifiable under the "sporting" theory that the next Postal Service errors might just as easily work to a union's detriment, the court's explanation was probably not satisfying to the companies that lost the unfair race. The real lesson of *International Union,* however, is the implications that it has for the inherent fairness of a system that depends so critically upon the

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[109] *See* International Union of Elec., Radio & Mach. Workers v. NLRB, 610 F.2d 956, 963-64 (D.C. Cir. 1979); Comment, *supra* note 83, at 171-72. This problem is ameliorated somewhat by the prevailing practice of large corporate litigants of hiring Washington, D.C. counsel, and the increasing trend of law firms outside that city to open Washington, D.C. offices. *See* Lewin, *Law Firms Branch Out, Go National,* Nat'l L.J., Aug. 7, 1978, at 1, col. 4.

[110] 610 F.2d 956 (D.C. Cir. 1979).

[111] 570 F.2d 965, 976 (D.C. Cir. 1977) (opinion of Wilkey, J.).

[112] 610 F.2d at 963-64 (emphasis in original).

Postal Service, battery-operated courthouse clocks, and the speed with which secretaries and court clerks open their mail.[113]

More fundamentally, in the relatively rare cases in which there is a large disparity in the parties' wealth, one might legitimately question a system that allows the party with the resources to afford open long-distance telephone lines and sophisticated electronic equipment to choose the forum for review. In the typical FERC case the petitioners are equally well endowed to afford a sophisticated courthouse race. Similarly, the capacity of labor unions to absorb the cost of race is not far different from that of their employer antagonists. Consumer and environmental groups, however, often operate on shoestring budgets, and it seems less fair to require them to race on the same terms as their industrial opponents.[114]

C. *The Starting Pistol*

Because a false start can just as easily result in a defeat as a slow pace,[115] the parties all have a legitimate concern that there be an agreed upon starting gun. Nevertheless, most agencies have until very recently taken a lackadaisical attitude toward designating the moment in time at which an order is ripe for review, leaving the parties to fight about that question at the appellate level. In the previously described race-to-the-courthouse for review of OSHA's benzene temporary standard,[116] for example, Judge Wilkey felt that the court did not even have jurisdiction to order transfer to the Fifth Circuit. In his opinion the union had jumped the gun when it filed its petition immediately after a private meeting with the Assistant Secretary, without waiting for the agency to inform the public through a press conference.[117] Because the agency action was not in his opinion ripe for review at the time the union filed its petition, the court did not have jurisdiction to entertain the appeal.[118] Although no court has yet disqualified a racer for a false start,[119] the threat is always present, and it remains a fertile source for additional threshold litigation.

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[113] *See* City of Chicago v. FPC, 360 F.2d 828 (D.C. Cir. 1965) (although petitions were received on the same morning by two courts of appeals, § 2112(a) requires that record remain in circuit in which clerk first stamped petition with a docket number).

[114] *See* Letter from J. Taylor Banks, Natural Resources Defense Council, Inc. to Joan Z. Bernstein, General Counsel, EPA (Feb. 20, 1979), *reprinted in* 44 Fed. Reg. 32,008 (1979).

[115] *See* Southland Mower Co. v. CPSC, 600 F.2d 12 (5th Cir. 1979) (dismissing several petitions as premature); Industrial Union Dep't v. Bingham, 570 F.2d 965, 973 (D.C. Cir. 1977) (opinion of Wilkey, J.); *cf.* J.P. Stevens & Co. v. NLRB, 592 F.2d 1237, 1239 (4th Cir. 1979) (court transfers to Second Circuit for determination whether union filed too soon); Fels, *supra* note 85, at 40-42.

[116] *See* notes 20-39 *supra* & accompanying text.

[117] Industrial Union Dep't v. Bingham, 570 F.2d at 974-75 (opinion of Wilkey, J.) (citing Saturn Airways, Inc. v. CAB, 476 F.2d 907 (D.C. Cir. 1973), in which the court held that an agency order was ripe for review at the time the agency made its decision public through a press release).

At the other extreme, the unwary practitioner can discover that the race has already ended before he has even assumed his position at the starting blocks. Ripeness for review is a protean concept,[120] and the attorney who wants to win must be awake to any agency action that might render the agency proceeding ripe for review. For example, in *Saturn Airways, Inc. v. CAB,*[121] the petitioner who waited until the agency released the actual text of its regulations discovered that it had lost the race to the petitioner who had filed immediately after the agency had issued a press release describing the regulations.[122] Counsel must also be aware of the agency's statute or regulations governing the status of an order that is subject to a motion for reconsideration. If such a motion is required, then the only appropriate time for filing an appeal is after the agency has ruled on the motion.[123] When the agency has not specified by regulation whether a motion for reconsideration is required, the party that awaits the agency's final ruling on the motion can discover that the race was over weeks ago when the petition for review of the original agency action was filed.[124]

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[118] *Id.*

[119] *See* Westinghouse Elec. Corp. v. NRC, 598 F.2d 759, 765-69 (3d Cir. 1979) (petitions filed after order terminating environmental impact proceedings, rather than after release of statement of reasons for order, not premature); Kronenberger v. NLRB, 496 F.2d 18 (7th Cir. 1974) (petition filed immediately after order, rather than after agency ruling on motion for reconsideration, not premature); Saturn Airways, Inc. v. CAB, 476 F.2d 907 (D.C. Cir. 1973) (petition filed after press release, rather than after release of text of order, not premature).

[120] *See generally* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 21.06-21.07 (1976); K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 21.06-21.07 (1958).

[121] 476 F.2d 907 (D.C. Cir. 1973).

[122] *See also* Westinghouse Elec. Corp. v. NRC, 598 F.2d 759, 765-68 & n.21 (3d Cir. 1979) (statement of reasons need not accompany an administrative order to make that order "final" and hence ripe for review; petitioner who waited for statement of reasons consequently lost the race).

See also ITT World Communications, Inc. v. FCC, 621 F.2d 1201 (2d Cir. 1980), in which a Second Circuit panel split over determination of the appropriate starting gun. In that case, the FCC on December 12 adopted an order in a public meeting accompanied by a news release, but without a formal written opinion. The formal opinion was not released until some three weeks later. At issue was whether the order was ripe for review for the purposes of § 2112(a) as of December 12. Judge Mansfield, joined by Judge Lumbard, opined that, unless the agency specifies an effective date, an order becomes ripe for review when announced at a meeting where "all parties [have] an equal opportunity to learn fairly and simultaneously of the Commission's action and of the terms of its order and decision." *Id.* 1209 (Mansfield, J., concurring); *accord* note 31 *supra*. Judge Newman, on the other hand, advocated an entirely different approach. If the point at which the order is ripe for review is ambiguous, as he felt it was in this case, then he advised abandoning the first-to-file rule and following a "convenience of the parties" test. *See* 621 F.2d at 1206-07; notes 153-58 *infra* & accompanying text. Judge Newman admitted that unless an agency specifies a time at which an order becomes effective, the time at which the order becomes ripe will generally be ambiguous. *See* 621 F.2d at 1207 n.8. Thus, this proposed exception could swallow the first-to-file rule. It remains to be seen if other circuits will respond more favorably to Judge Newman's suggestion than did his colleagues on the panel.

The lesson that the diligent attorney can draw from this is that it is prudent to file a petition for review after every agency movement that might conceivably be construed as the starting gun. If the attorneys for all of the parties are equally diligent, the result can be not one, but many sophisticated races to the courthouse for review of a single agency action. The reductio ad absurdum of this approach is the classic *Shell Oil Co. v. FPC*[125] race in which innovative attorneys beat the system by preparing multiple copies of a single petition and filing them at two second intervals on either side of the time that the agency's decision was expected.[126] The circuit in which this occurred did not question the fairness of this procedure, noting only that such forum shopping is "inherent in the statute."[127]

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[123] *See* American Pub. Gas Ass'n v. FPC, 555 F.2d 852, 856 (D.C. Cir. 1976) ("Under the Natural Gas Act, an order lacks jurisdictional ripeness for review until the Commission has disposed of a petition to reconsider alleged error in it (or until a reasonable time to act upon such petition has expired).").

[124] *See* Kronenberger v. NLRB, 496 F.2d 18 (7th Cir. 1974).

[125] 509 F.2d 176 (5th Cir. 1975).

[126] *Id.* 179. All of the earlier petitions were, of course, premature, but the petitioners virtually guaranteed themselves the first filing, so long as they did not run out of petitions.

[127] *Id.*

Attorneys for the American Petroleum Institute (API) recently came up with another way to stack the odds in their own favor in their race to the courthouse. OSHA's promulgation of its generic carcinogen standards on January 18, 1980 precipitated a race to the Fifth and District of Columbia Circuits by the API and AFL-CIO respectively. The API won the race, but it may have done so only by jumping the starting gun. The AFL-CIO asked for transfer to the District of Columbia on this and other grounds.

Perhaps in order to enhance the chances that the Fifth Circuit would decide to retain venue, attorneys for API filed three suits in Texas federal *district* court challenging the carcinogen standards. When the district court summarily dismissed the suits on jurisdictional grounds, the Institute appealed the dismissal to the Fifth Circuit, and then pointed to the pending appeal as a reason militating in favor of the Fifth Circuit retaining jurisdiction over the challenge to the standards originally filed in that court. This bootstrapping apparently succeeded because the Fifth Circuit cited to the pending appeal as one reason in support of its decision to retain venue. *See* American Petroleum Inst. v. OSHA, Nos. 80-3051 *et al.* (5th Cir. Sept. 15, 1980) (unpublished order).

Even more distressing than the threat of multiple races is the possibility that a party will file a bogus action for emergency relief under the All Writs Act, 28 U.S.C. § 1651 (1976), before an appeal would otherwise be ripe in an attempt to establish priority under § 2112(a). Fortunately, the only court in which this ploy has been attempted has rejected it outright. *See* American Pub. Gas Ass'n v. FPC, 555 F.2d 852, 856-57 (D.C. Cir. 1976).

D. *The Scope of the Agency Action*

Section 2112(a) provides for consolidation of appeals from "the same order" in the circuit in which the first petition was filed.[128] Given the rich variety of agency actions that section 2112(a) attempts to address, its oblique reference to the "same order" has, not surprisingly, proven unsatisfactory. Because a single administrative proceeding can address multiple parties, products, and issues, controversy can arise over whether the result of a proceeding is a single order or a series of separately issued orders.

1. Single Agency Action

Most agency proceedings are terminated by a single agency action. Courts appear to be confused about how such actions should be treated under the "same order" requirement of section 2112(a). For example, in *Bristol Laboratories, Inc. v. Richardson,*[129] the Food and Drug Administration (FDA) addressed in a single decertification proceeding "a group of fifteen fixed-combination drugs having common characteristics and subject to common criticisms" and concluded the proceeding by issuing a single order.[130] American Cyanamid filed the first petition for review in the First Circuit.[131] Bristol filed a later appeal in the Third Circuit, which was promptly transferred, pursuant to section 2112(a), to the First Circuit. In its motion to have its petition retransferred to the Third Circuit, Bristol claimed that the FDA order issued at the conclusion of its proceeding was really several orders, only one of which was addressed to Bristol and its product. The court denied the motion, noting its hesitancy "to ignore the unitary label given the order." [132] The court concluded that

> To consider the order atomized because of its application to several products, although those products are substantially similar in composition and therapeutic theory and their use presented a common problem dealt with in a single decertification proceeding, does not appear to comport with either the letter or spirit of § 2112(a).[133]

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[128] 28 U.S.C. § 2112(a) (1976). See note 6 *supra* for full statutory text.

The "same order" requirement, a condition precedent to the invocation of the first-to-file rule of § 2112(a), should be distinguished from the "similar proceedings" branch of the alternatively available discretionary transfer mechanism. *See* text accompanying notes 169-71 *infra.*

[129] 456 F.2d 563 (1st Cir. 1971).

[130] *Id.* 565.

[131] *See* American Cyanamid Co. v. Richardson, 456 F.2d 509 (1st Cir. 1971).

[132] 456 F.2d at 564.

[133] *Id.* 564-65.

By contrast, the court in *Far East Conference v. FMC*[134] refused to accept the agency's definition of the scope of its order. In that case the Federal Maritime Commission, as part of a generic proceeding concerning a "Foreign Trade Study," issued several identical orders requesting information from the various maritime freight conferences. The first challenges to the Commission's authority to issue the orders were filed in the Ninth Circuit. Later appeals were filed in the District of Columbia Circuit. The Commission moved to transfer the appeal to the Ninth Circuit on the ground that the petitions were for review of the same order. The District of Columbia Circuit denied the motion, stating only that "the orders themselves cannot be considered the 'same order' within the meaning of the statute."[135]

The results in *Bristol Laboratories* and *Far East Conference* are difficult to reconcile. That the former involved a unitary order while the latter involved, as a formal matter, multiple orders is a distinction without a difference. Courts generally look to the substance of the agency action when determining whether or not such action constitutes the "same order" under section 2112(a);[136] the orders issued in *Far East Conference* were absolutely identical except for the target party's name. While *Bristol Laboratories* represents a salutary attempt by a court to avoid wasting judicial and client resources, the court in *Far East Conference,* by adhering to an extremely narrow definition of "same order," decided to forego a similar opportunity.

2. Successive Agency Actions

Agencies can issue many appealable final orders during the course of a single proceeding or related proceedings. If, at the end of the proceedings, no separate appeals have been taken, the courts are likely to characterize the final order that concludes the proceeding as a single order subject to review in a single court.[137] Similarly, when two orders have emanated from two formally separate and unrelated proceedings, they probably will not be characterized as a "single order."[138]

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[134] 337 F.2d 146 (D.C. Cir. 1964), *cert. denied,* 379 U.S. 991 (1965).

[135] *Id.* 148 n.1.

[136] *See* notes 137-49 *infra* & accompanying text.

[137] *See* American Civil Liberties Union v. FCC, 486 F.2d 411, 414 (D.C. Cir. 1973) ("The several orders issued in the course of that proceeding represent the staggered implementation of a single, multi-faceted agency undertaking.").

[138] *See* American Tel. & Tel. Co. v. FCC, 519 F.2d 322 (2d Cir. 1975) (order setting rate of return for AT&T and later order rejecting proposed increase because

Even these reasonably straightforward rules, however, are often difficult to apply to the remarkable diversity of appealable agency actions. In *BASF Wyandotte Corp. v. Costle*,[139] for example, the EPA, pursuant to a court order,[140] had issued proposed regulations establishing effluent limitations guidelines for the pesticides industry. Because of the pressure of the court order, EPA made the proposed regulations effective immediately, but subject to change after comment from interested parties. The proposed regulations were therefore in effect final interim regulations. Several companies petitioned for review of the proposed regulations; the first petition was filed in the First Circuit. Approximately two years later, EPA published final regulations, which amended the proposed regulations in many respects. One pesticide company filed a petition for review of the final regulations in the Fifth Circuit. The First Circuit petitioner then simply amended its complaint to include the final regulations. Relying on dicta from the District of Columbia Circuit,[141] the First Circuit held that sequential regulations should be considered the same order if they arise from the "same or interrelated proceedings." [142] Because the EPA proceedings met that test, the court held that the two orders, even though separated by two years, were in fact the same order. The First Circuit was therefore the circuit of the first filed petition.

Although the courts have not been entirely consistent,[143] the *BASF Wyandotte* "same or interrelated proceedings" test adequately characterizes the holdings in cases in which the prior successive order is pending in a court of appeals at the time the second order is issued.[144] When one court has already disposed of an appeal

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it would result in higher rate of return than first order allowed are not the "same order"; however, case transferred under court's "inherent power" to transfer).

[139] 582 F.2d 108 (1st Cir. 1978).

[140] Natural Resources Defense Council, Inc. v. Train, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd sub nom.* Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977).

[141] *See* Public Serv. Comm'n v. FPC, 472 F.2d 1270, 1272 (D.C. Cir. 1972); Eastern Air Lines, Inc. v. CAB, 354 F.2d 507, 510 (D.C. Cir. 1965).

[142] 582 F.2d at 112.

[143] *Compare* Midwest Video Corp. v. United States, 362 F.2d 259 (8th Cir. 1966) (court refuses to retain appeal from order regulating all cable television systems when petitions to review order regulating only microwave cable television systems are presently pending before the court) *with* Midwest Television, Inc. v. FCC, 364 F.2d 674 (D.C. Cir. 1966) (court transfers appeal from board plan to regulate cable television to circuit in which petitions for review of previously issued narrow rules on the same subject matter are currently pending).

[144] *See* Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) (court refuses to transfer petition for review of denial of fairness doctrine complaint to circuit reviewing previously issued generic fairness doctrine report because no clear showing made that the two proceedings are sufficiently interrelated). The court in Public Serv. Comm'n v. FPC, 472 F.2d

from one of two or more successive orders in a single proceeding, however, the courts typically require the parties to run a new race, even if the orders are very closely related.[145] *American Civil Liberties Union v. FCC* [146] is an excellent example. In the course of protracted proceedings concerning cable television, the Commission issued numerous appealable orders. The American Civil Liberties Union (ACLU) petitioned for review of a June 26, 1972 order, and the District of Columbia Circuit summarily disposed of that appeal on April 6, 1973.[147] On April 2, 1973, the ACLU petitioned for review of apparently another aspect of the June 26, 1972 order and of a January 31, 1973 order which terminated the entire proceeding. Although another party had won the race for review of the January 31, 1973 order in the Ninth Circuit, the ACLU argued that the June 26 order was the "same order" for purposes of section 2112(a). The court disagreed, holding that "[i]t is not possible to consolidate a pending petition with one involved in litigation which has ended." [148] On the other hand, the court held that the June 26, 1972 and January 31, 1973 orders were the same order for purposes of deciding issues that remained open after the first appeal. The court, therefore, ordered transfer to the circuit in which the first petition for review of the January 31, 1973 order had been filed, despite the fact that no appeal from the June 26, 1972 order had been filed in that circuit. Thus, the court took a liberal view toward combining pending successive orders into a single order for purposes of section 2112(a), but refused to combine two successive orders when an appeal from one of them had already been decided.[149]

1270 (D.C. Cir. 1972) articulated a very narrow test for the term "interrelated": "[T]he 'interrelated' term refers to an organic relation in what may fairly be called a single 'total proceeding' and not merely similarity of legal issues." *Id.* 1272 n.4. *But cf.* American Tel. & Tel. Co. v. FCC, 519 F.2d 322 (2d Cir. 1975) (court indicates that order granting individual rate increase and previous order setting overall rate of return could be "same order" under § 2112(a); court transfers under its inherent powers).

[145] One court has hinted at a possible exception to this general rule in situations in which a petition is "brought for review of an order entered after remand." Public Serv. Comm'n v. FPC, 472 F.2d 1270, 1272 (D.C. Cir. 1972). However, the only direct precedent is equivocal. *See* Pacific Gas & Elec. Co. v. FPC, 272 F.2d 510 (D.C. Cir. 1958) (circuit court has discretion to either transfer or hear the case).

[146] 486 F.2d 411 (D.C. Cir. 1973). *See also* Pan Am. World Airways, Inc. v. CAB, 380 F.2d 770 (2d Cir. 1967), *aff'd by an equally divided Court,* 391 U.S. 461 (1968); Far East Conference v. CAB, 337 F.2d 146 (D.C. Cir.), *cert. denied,* 379 U.S. 991 (1964).

[147] National Ass'n of Theater Owners v. FCC, 477 F.2d 450 (D.C. Cir. 1973).

[148] 486 F.2d at 414.

[149] The Ninth Circuit retained jurisdiction over the petition that had been transferred to it and decided that case even after it had remanded the first insti-

E. *Discretionary Transfer*

Courts have broad authority under section 2112(a) to transfer a case to any other circuit "[f]or the convenience of the parties in the interest of justice."[150] Courts have also spoken of an "inherent power" to transfer to a more appropriate circuit.[151] In addition to pressing for transfer because of an allegedly unfair race, litigants have argued that courts should order discretionary transfer because another circuit is more convenient, because another circuit is more affected by the agency ruling, or because other orders from the same or similar administrative proceeding are pending in or have been decided by another circuit. Only the latter two arguments have met with much success in the courts of appeals.[152]

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tuted proceedings to the Commission. *See* American Civil Liberties Union v. FCC, 523 F.2d 1344, 1346 (9th Cir. 1975).

[150] 28 U.S.C. § 2112(a) (1976).

As a matter of statutory interpretation, it is not clear exactly how the phrases "for the convenience of the parties" and "in the interest of justice" interrelate. As a starting point, it can be safely stated that the two phrases should not be read disjunctively. Such a reading would permit a court to order a transfer that would be convenient but not in the interests of justice. *See* S. REP. No. 2129, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3996. But beyond this, it is questionable whether one criterion is primary to the other. At least one judge has argued that transfer may be effected *only* for convenience; the justice requirement serves merely to provide a reason not to transfer. *See* Industrial Union Dep't v. Bingham, 570 F.2d 965, 979 & nn.4, 6 (D.C. Cir. 1977) (Fahy, J., dissenting). Most courts, however, appear to feel that the convenience requirement limits the "in the interests of justice" requirement. *See* notes 154-55 *infra* & accompanying text. Thus, as long as a transfer was not inconvenient to a party, a court could order a transfer solely "in the interest of justice."

[151] *See* note 88 *supra*.

[152] The author has discovered twenty-two published or otherwise reported opinions in which a court has been asked to transfer pursuant to its "inherent power" or pursuant to the "in the interest of justice for the convenience of the parties" provision of § 2112(a). ITT World Communications, Inc. v. FCC, 621 F.2d 1201 (2d Cir. 1980); International Union of Elec., Radio & Mach. Workers v. NLRB, 610 F.2d 956 (D.C. Cir. 1979); Southland Mower Co. v. CPSC, 600 F.2d 12 (5th Cir. 1979); United Steelworkers v. Marshall, 592 F.2d 693 (3d Cir. 1979); Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978); Industrial Union Dep't v. Bingham, 570 F.2d 965 (D.C. Cir. 1977); American Pub. Gas Ass'n v. FPC, 555 F.2d 852 (D.C. Cir. 1976); Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975), *cert. denied,* 424 U.S. 965 (1976); American Tel. & Tel. Co. v. FCC, 519 F.2d 322 (2d Cir. 1975); Farah Mfg. Co. v. NLRB, 481 F.2d 1143 (8th Cir. 1973); Saturn Airways, Inc. v. CAB, 476 F.2d 907 (D.C. Cir. 1973); Public Serv. Comm'n v. FPC, 472 F.2d 1270 (D.C. Cir. 1972); Municipal Distribs. Group v. FPC, 459 F.2d 1367 (D.C. Cir. 1972); J.L. Simmons Co. v. NLRB, 425 F.2d 52 (7th Cir. 1970); J.P. Stevens & Co. v. NLRB, 388 F.2d 892 (4th Cir. 1967); Pan Am. World Airways, Inc. v. CAB, 380 F.2d 770 (2d Cir. 1967), *aff'd by an equally divided Court,* 391 U.S. 461 (1968); J.P. Stevens & Co. v. NLRB, No. 11,246 (4th Cir. Apr. 10, 1967) (unpublished order) (discussed in J.P. Stevens & Co. v. NLRB, 388 F.2d 892 (4th Cir. 1967)) ("Stevens II"); International Union, UAW v. NLRB, 373 F.2d 671 (D.C. Cir. 1967); Midwest Television, Inc. v. FCC, 364 F.2d 674 (D.C. Cir. 1966); Insurance Workers Int'l Union v. NLRB, 360 F.2d 823 (D.C. Cir. 1966); Eastern Air Lines, Inc. v. CAB,

1. Convenience of the Parties

The convenience of the parties is explicitly included in section 2112(a) as a consideration for discretionary transfer.[153] Yet while the parties have occasionally urged that transfer to another court would be more convenient,[154] no court has transferred on this basis alone.[155] Because each party can usually make a reasonably plausible argument that the circuit of its choice is most convenient,[156] it is not surprising that the courts have not made convenience a major factor in transfer decisions. Indeed, one pragmatic court has recognized that "[t]he only significant convenience factor which affects petitioners seeking review of rulemaking on an agency record is the convenience of counsel who will brief and argue the peti-

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354 F.2d 507 (D.C. Cir. 1965); Far East Conference v. FMC, 337 F.2d 146 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 991 (1965).

In 11 of those cases transfer was ordered. In one case the court apparently transferred because it was concerned about the fairness of the agency's procedures for beginning the race. Industrial Union Dep't v. Bingham, 570 F.2d 965 (D.C. Cir. 1977). In two cases, the court transferred because it held the first-filing party insufficiently aggrieved by the agency action to have its choice of forum. J.L. Simmons Co. v. NLRB, 425 F.2d 52 (7th Cir. 1970); Insurance Workers Int'l Union v. NLRB, 360 F.2d 823 (D.C. Cir. 1966). In the remaining eight cases the court transferred because another petition from the same or similar case had been previously filed or decided. United Steelworkers v. Marshall, 592 F.2d 693 (3d Cir. 1979); Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978); American Tel. & Tel. Co. v. FCC, 519 F.2d 322 (2d Cir. 1975); Farah Mfg. Co. v. NLRB, 481 F.2d 1143 (8th Cir. 1973); Municipal Distribs. Group v. FPC, 459 F.2d 1367 (D.C. Cir. 1972); J.P. Stevens & Co. v. NLRB, No. 11,246 (4th Cir. Apr. 10, 1967) (unpublished order) (discussed in J.P. Stevens & Co. v. NLRB, 388 F.2d 892 (4th Cir. 1967)) ("Stevens II"); Midwest Television, Inc. v. FCC, 364 F.2d 674 (D.C. Cir. 1966); Eastern Air Lines, Inc. v. CAB, 354 F.2d 507 (D.C. Cir. 1965).

One should be cautious in interpreting this tabulation, however, because it reflects only those transfers that resulted in published opinions or were otherwise reported.

[153] 28 U.S.C. § 2112(a) (1976). *See also* 28 U.S.C. § 1404(a) (1976).

[154] *See, e.g.*, United Steelworkers v. Marshall, 592 F.2d 693 (3d Cir. 1979); Industrial Union Dep't v. Bingham, 570 F.2d 965 (D.C. Cir. 1979); American Pub. Gas Ass'n v. FPC, 555 F.2d 852 (D.C. Cir. 1976).

[155] While no court has transferred to another circuit on the basis of convenience alone, the District of Columbia Circuit cited the convenience of the parties as a reason for refusing to transfer in a case involving simultaneous filings. American Pub. Gas Ass'n v. FPC, 555 F.2d 852, 857 (D.C. Cir. 1976). *See also* ITT World Communications, Inc. v. FCC, 621 F.2d 1201, 1208 (2d Cir. 1980). However, in Industrial Union Dep't v. Bingham, 570 F.2d 965 (D.C. Cir. 1977), a case in which three separate opinions were filed, the court transferred the case to the Fifth Circuit, despite opinions by two of the three judges that the District of Columbia Circuit was the most convenient.

[156] For example, in United Steelworkers v. Marshall, 592 F.2d 693, 697 (3d Cir. 1979), the Lead Industries Association argued that the Fifth Circuit was more convenient than the Third Circuit because a large number of employers who were aggrieved by OSHA's lead standard were located in the Fifth Circuit. The United Steelworkers replied that 15,000 of its members worked in plants in the Third Circuit. The court quite justifiably declined to decide which of the two circuits was the most convenient for the parties.

tions."[157] Given the universal use of air travel and long distance telecommunications, it is unlikely that arguing an appeal before a distant court will be significantly inconvenient for counsel. Nor are the additional expenses associated with such travel a significant portion of the cost of an appeal from administrative rulemaking.[158]

2. Regional Impact of the Agency Action

Parties in a few cases have urged discretionary transfer on the ground that one circuit is more "affected" by the agency action than another.[159] No court has ordered transfer solely on this ground, although it has apparently played some role in two NLRB unfair labor practice cases.[160] Courts have recognized that it is usually difficult to pinpoint a region that is more affected by a federal administrative action than another,[161] and they understandably have been reluctant to initiate threshold inquiries into this essentially factual question in deciding whether to use their discretionary transfer power.

3. Comparative Aggrievement

Later-filing parties have in numerous cases contended that the first-filing party was not sufficiently "aggrieved" by the agency action to be entitled to its choice of forum, and they have urged the courts to exercise their discretionary power to transfer to the "more aggrieved" party's circuit. Although the courts have stated in dicta that "a party's selection of forum is [not] necessarily controlling if it has received substantially all of the relief contemplated," [162] they have ordered transfer on this basis in only two cases.[163] In one of them, *Insurance Workers International Union v. NLRB,*[164] the union challenged the Board's unit designation on two grounds: (1) that it did not include fire insurance agents, and (2) that the Board should have compelled the employer to accept and abide by the terms of the collective bargaining agreement that would have been entered into had the employer bargained in good faith. After holding oral argument and probing the record deeply for evidence on the question, the court rejected the union's first contention because it was factually incorrect. It rejected the union's second argument because it was so speculative that the Board probably would have lacked authority to decide it. The court therefore transferred the case to the Seventh Circuit so that that court could rule on the employer's claim on the merits that all the insurance workers were in fact independent contractors. Interestingly, the court refused to dismiss the union's claims on standing grounds; the court opined that the Seventh Circuit should have an independent opportunity to probe the union's aggrievement.[165]

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[157] *Id.*

[158] *See* 16 WRIGHT AND MILLER, *supra* note 4, § 3944, at 339; Carrington, *supra* note 74, at 608; Currie & Goodman, *supra* note 3, at 8; Fels, *supra* note 85, at 45.

[159] *See* International Union of Elec., Radio & Mach. Workers v. NLRB, 610 F.2d 956, 962 (D.C. Cir. 1979); American Pub. Gas Ass'n v. FPC, 555 F.2d 852, 858 n.5 (D.C. Cir. 1976); Farah Mfg. Co. v. NLRB, 481 F.2d 1143 (8th Cir. 1973); Public Serv. Comm'n v. FPC, 472 F.2d 1270 (D.C. Cir. 1972); J.P. Stevens & Co. v. NLRB, No. 11,246 (4th Cir. Apr. 10, 1967) (unpublished order) (discussed in J.P. Stevens & Co. v. NLRB, 388 F.2d 892 (4th Cir. 1967)) ("Stevens II").

[160] *See* Farah Mfg. Co. v. NLRB, 481 F.2d 1143 (8th Cir. 1973); J.P. Stevens & Co. v. NLRB, No. 11,246 (4th Cir. Apr. 10, 1967) (unpublished order) (discussed in J.P. Stevens & Co. v. NLRB, 388 F.2d 892 (4th Cir. 1967)). ("Stevens II"). *But see* International Union of Elec., Radio & Mach. Workers v. NLRB, 610 F.2d 956, 962 (D.C. Cir. 1979).

[161] *See* United Steelworkers v. Marshall, 592 F.2d 693, 697 (3d Cir. 1979); American Pub. Gas Ass'n v. FPC, 555 F.2d 852, 859 n.5 (D.C. Cir. 1976); Public Serv. Comm'n v. FPC, 472 F.2d 1270 (D.C. Cir. 1972). Although the courts have not been favorably disposed toward regional impact as a transfer criterion, Congress has been urged to include it explicitly as a criterion. *See* notes 269-77 and 304-05 *infra* & accompanying text.

Few courts, however, have been as eager as the *Insurance Workers* court to probe the record on the aggrievement question in making the threshold decision whether to transfer. More recently, courts have cautioned that "[t]he possibility of a transfer on this ground is not to be taken as permitting a trial by affidavit on the issue of motivation." [166] It would seem particularly wasteful of valuable judicial resources to address one party's aggrievement extensively in a threshold transfer proceeding and then leave the aggrievement question open for re-resolution after transfer. Indeed, one year after *Insurance Workers* was decided, the District of Columbia Circuit limited its use of the comparative aggrievement factor to "the special case where the 'inconsequential' character of the deficiency in findings or relief is established by the petitioner's own stipulation . . . or other pleading or representation." [167] Under this narrow test the courts, not surprisingly, have refused to order transfer in the vast majority of cases.[168]

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[162] International Union, UAW v. NLRB, 373 F.2d 671, 674 (D.C. Cir. 1967).

[163] J.L. Simmons Co. v. NLRB, 425 F.2d 52 (9th Cir. 1970); Insurance Workers Int'l Union v. NLRB, 360 F.2d 823 (D.C. Cir. 1966). See also Ithaca College v. NLRB, 623 F.2d 224 (2d Cir. 1980), in which the Second Circuit speculated about the District of Columbia Circuit's stand on the relative aggrievement test for discretionary transfer.

[164] 360 F.2d 823 (D.C. Cir. 1966).

[165] The only other case in which transfer was ordered because of the first-filing party was insufficiently aggrieved is J.L. Simmons Co. v. NLRB, 425 F.2d 52 (9th Cir. 1970), in which the employer challenged the Board's order requiring the union to cease and desist from its secondary boycott. Although the Board gave the employer all the relief that it requested, it declined to rule on one of the employer's contentions, because such a ruling was unnecessary to decide the case. Without finding that the employer was not an "aggrieved party" within the meaning of the judicial review section of the National Labor Relations Act, 29 U.S.C. § 160(f) (1976), the court ruled that the employer's aggrievement did not warrant allowing it to choose the forum for appeal.

[166] International Union, UAW v. NLRB, 373 F.2d 671, 674 (D.C. Cir. 1967). *See also* International Union of Elec., Radio & Mach. Workers v. NLRB, 610 F.2d 956, 962 (D.C. Cir. 1979); United Steelworkers v. Marshall, 592 F.2d 693, 696 (3d Cir. 1979) ("Certainly the reference to 'the interest of justice' in § 2112(a)

4. Same or Similar Proceedings in Another Circuit

In eight of the eleven reported cases in which the courts have ordered discretionary transfer, they have done so because the transferee circuit had previously decided a case arising out of the same or similar administrative proceeding or involving the same or similar issues.[169] As previously discussed,[170] courts can order transfer to another court in which a petition from the same or similar

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was not intended to require such a preliminary examination of the merits."); Truck Drivers & Helpers Local 728 v. NLRB, 386 F.2d 643, 644 (D.C. Cir. 1967); Ball v. NLRB, 299 F.2d 683, 689 (D.C. Cir.), *cert. denied*, 369 U.S. 838 (1962).

[167] International Union, UAW v. NLRB, 373 F.2d 671, 674 (D.C. Cir. 1967). *See also* Public Serv. Comm'n v. FPC, 472 F.2d 1270, 1272 n. 2 (D.C. Cir. 1972) (recognizing the possibility of transfer because of insufficient aggrievement, but limiting it to the same "special case" as *International Union, UAW*). *See also* United Steelworkers v. Marshall, 592 F.2d 693, 696 (3d Cir. 1979) ("[C]ourts have limited the inquiry into the respective merits of the petitions to a determination whether the petitioning party's claim of aggrievement is so frivolous or insubstantial as to undercut the assumption of a good faith petition for review.").

[168] *See* International Union of Elec., Radio & Mach. Workers v. NLRB, 610 F.2d 956, 962 (D.C. Cir. 1979); United Steelworkers v. Marshall, 592 F.2d 693 (3d Cir. 1979) (transfer granted on other grounds); American Pub. Gas Ass'n v. FPC, 555 F.2d 852, 858 n.5 (D.C. Cir. 1976); Saturn Airways, Inc. v. CAB, 476 F.2d 907 (D.C. Cir. 1973); Truck Drivers & Helpers Local 728 v. NLRB, 386 F.2d 643 (D.C. Cir. 1967); International Union, UAW v. NLRB, 373 F.2d 671 (D.C. Cir. 1967); Ball v. NLRB, 299 F.2d 683, 689 (4th Cir.), *cert. denied*, 369 U.S. 838 (1962).

One court, however, has cited relative aggrievement as a reason for denying a motion for transfer. *See* ITT World Communications, Inc. v. FCC, 621 F.2d 1201, 1208 (2d Cir. 1980).

[169] United Steelworkers v. Marshall, 592 F.2d 693 (3d Cir. 1979); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1022 (D.C. Cir. 1978); American Tel. & Tel. Co. v. FCC, 519 F.2d 322 (2d Cir. 1975); Farah Mfg. Co. v. NLRB, 481 F.2d 1143 (8th Cir. 1973); Municipal Distribs. Group v. FPC, 459 F.2d 1367 (D.C. Cir. 1972); J.P. Stevens & Co. v. NLRB, No. 11, 246 (4th Cir. Apr. 10, 1967) (unpublished order) (discussed in J.P. Stevens & Co. v. NLRB, 388 F.2d 892, 894 (4th Cir. 1967)) ("Stevens II"); Midwest Television, Inc. v. FCC, 364 F.2d 674 (D.C. Cir. 1966); Eastern Air Lines, Inc. v. CAB, 354 F.2d 507 (D.C. Cir. 1965).

[170] *See* notes 137-49 *supra* & accompanying text.

administrative order has been filed, but not decided, by broadly interpreting the term "same order." A court's determination that two orders are not the "same order," however, does not end the matter, because the court receiving the first petition in the second race may still order discretionary transfer.[171] The courts appear to agree that "one circuit's familiarity with the issues and parties from prior litigation"[172] and "the need for continuity and consistency in reviewing a series of agency decisions"[173] are factors that should be considered in deciding whether discretionary transfer is appropriate, but they also disavow any theory of "specialization of tribunals."[174] Unfortunately, the courts have been unable to articulate and consistently follow a single rule for striking the delicate balance between judicial economy and generalist courts.

The District of Columbia Circuit made the first attempt to state such a rule in *Eastern Air Lines, Inc. v. CAB*.[175] In that case, the First Circuit had twice remanded a Civil Aeronautics Board order denying Northeast Airlines a renewal of its certificate for an East Coast-Florida route. In response to the second remand, the agency on April 26, 1965 reopened the East Coast-Florida proceedings to reconsider entirely the number of carriers that should be allowed on that route and who those carriers should be. The First Circuit, noting that the Board's action went beyond that court's second remand, relinquished jurisdiction. Meanwhile, the other two carriers that owned certificates for the route filed a petition in the District of Columbia Circuit to review the April 26 order. Because the First Circuit had already issued its opinions with respect to the first two agency orders, the District of Columbia Circuit could not rely upon the "same order" rule to order transfer to the First Circuit.[176] Nevertheless, the court ordered discretionary transfer, pointing out that the First Circuit was "familiar with the background of the controversy."[177] The court stated that section 2112(a) "should be liberally applied to permit review by a single court of closely related matters where appropriate for sound judicial administration."[178] Other circuits have followed this "familiar with the background of the controversy" test to varying degrees.[179]

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[171] *See* American Tel. & Tel. Co. v. FCC, 519 F.2d 322 (2d Cir. 1975) (court declines to decide "same order" question, but orders discretionary transfer).

[172] Abourezk v. FPC, 513 F.2d 504, 505 n.1 (D.C. Cir. 1975).

[173] *Id.*

[174] *See* International Union of Elec., Radio & Mach. Workers v. NLRB, 610 F.2d 956, 963 n.7 (D.C. Cir. 1979); United Steelworkers v. Marshall ,592 F.2d 693, 697 (3d Cir. 1979); American Pub. Gas Ass'n v. FPC, 555 F.2d 852, 857-58 (D.C. Cir. 1976); Public Serv. Comm'n v. FPC, 472 F.2d 1270, 1271-72 (D.C. Cir. 1972); Midwest Television, Inc. v. FCC, 364 F.2d 674, 675 (D.C. Cir. 1966). *But cf.* Public Interest Research Group v. FCC, 522 F.2d 1060, 1063 (1st Cir. 1975) (speaking of the "special familiarity of the D.C. Circuit with communications problems").

[175] 354 F.2d 507 (D.C. Cir. 1965).

[176] *See* note 145 *supra* & accompanying text. Indeed, because neither of the District of Columbia petitioners had its domicile or principal place of business in the First Circuit, the First Circuit did not even have proper venue. 354 F.2d at 510.

More recently, however, the District of Columbia Circuit has signaled a change in approach. In *Public Service Commission v. FPC,*[180] that circuit refused to transfer a petition for review of a East Texas Area natural gas rate proceeding to the Fifth Circuit, despite the gas producers' contention that the case and a rate proceeding just reviewed by the Fifth Circuit raised common questions of law and closely related questions of fact.[181] Four years later, in *American Public Gas Association v. FPC,*[182] the District of Columbia and Fifth Circuits received simultaneous petitions to review the second of FPC's nationwide natural gas rate proceedings. The

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[177] 354 F.2d at 510.

[178] *Id.* 511. *See also* Municipal Distribs. Group v. FPC, 459 F.2d 1367 (D.C. Cir. 1972); Midwest Television, Inc. v. FCC, 364 F.2d 674 (D.C. Cir. 1966).

[179] *See* American Tel. & Tel. Co. v. FCC, 519 F.2d 322, 327 (2d Cir. 1975) (court orders transfer of proceeding on individual rate hikes to court hearing appeal from proceeding prescribing a rate of return for AT&T; court notes that the transferee circuit is "intimately familiar with the background of this controversy"); Farah Mfg. Co. v. NLRB, 481 F.2d 1143, 1145 (8th Cir 1973) (court orders discretionary transfer of unfair labor practice case to court that had previously decided cases arising out of the same union organizational drive; court says that the transferee court is "familiar with the background of this case"). *But see* Pan Am. World Airways, Inc. v. CAB, 380 F.2d 770, 775 (2d Cir. 1967) (refusing to order discretionary transfer of appeal from order permitting international "inclusive tours" to court that had recently decided that the board lacked authority to authorize national "inclusive tours"; court refers to the "very unusual circumstances" of the earlier case); J.P. Stevens & Co. v. NLRB, 388 F.2d 892 (4th Cir. 1967) (having already transferred one order to court reviewing previous order arising out of the same union organizational effort, court refuses to order discretionary transfer of two subsequent orders).

[180] 472 F.2d 1270 (D.C. Cir. 1972).

[181] The court had to contend with a factually similar case decided in the opposite manner only four months earlier. In Municipal Distribs. Group v. FPC, 459 F.2d 1367 (D.C. Cir. 1972), a District of Columbia Circuit panel transferred an order arising out of the Southern Louisiana Area Rate Proceeding to the Fifth Circuit because that court was "familiar with the background of the controversy" through its review of a previous FPC order involving the same proceeding. *Id.* 1368. The *Public Service Commission* court distinguished *Municipal Distributors* on the basis of a fact which the *Municipal Distributors* court expressly refused to rely upon—that the Fifth Circuit petition in the latter case had been time-stamped two seconds earlier than the District of Columbia Circuit petition. *See* Public Serv. Comm'n v. FPC, 472 F.2d at 1273; Municipal Distribs. Group v. FPC, 459 F.2d at 1368.

[182] 555 F.2d 852 (D.C. Cir. 1976).

Fifth Circuit had recently decided the appeal from the first such proceeding. Declining to transfer, the District of Columbia Circuit pointed out that "general familiarity with the legal questions presented by a case is decidedly different from acquaintance with the proceedings that gave rise to the order in suit." [183]

These more recent cases indicate that the District of Columbia Circuit has abandoned the "familiar with the background of the controversy" test and adopted instead a narower standard, first articulated in *Public Service Commission.* Under this new test, a court should transfer only where "the same or inter-related proceeding was previously under review in a court of appeals, and is now brought for review of an order entered after remand, or in a follow-on phase, where continuance of the same appellate tribunal is necessary 'to maintain continuity in the total proceeding.' " [184]

There appears to be little difference between the new District of Columbia Circuit standard and the "same or interrelated proceedings" test that has evolved in the "same order" cases previously discussed.[185] At least in those circumstances in which the first order has not been the subject of a final judicial opinion,[186] it is difficult to imagine a case in which two orders would not be the "same order" but would be subject to discretionary transfer on the basis of the similarity of the proceedings under the District of Columbia Circuit test.[187] The test probably has its greatest application to cases in which a court receives the first petition for review of an order issued in a proceeding in which another court has already issued an opinion on another order in the same or similar proceeding. As previously noted, the courts have rarely, if ever, transferred under the "same order" provision of section 2112(a) in such a case.[188] The District of Columbia Circuit rule should similarly guarantee that few cases will be transferred from that circuit to other circuits that have previously decided appeals from the same or related proceedings.

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[183] *Id.* 857. The court relegated the *Municipal Distributors* case, *see* note 181 *supra,* to a footnote. 555 F.2d at 858 n.5.

The author believes that *Public Service Commission* and *American Public Gas Association* were rightly decided. The fact that one court has already decided a case involving similar factual or legal questions is no reason to transfer that case, regardless of the additional expertise that three judges of that circuit might possess. The complaint here is with the failure of the District of Columbia Circuit to overrule *Municipal Distributors* and limit *Eastern Air Lines* to its peculiar facts.

[184] Public Serv. Comm'n v. FPC, 472 F.2d 1270, 1272 (D.C. Cir. 1972) (quoting Pacific Gas & Elec. Co. v. FPC, 282 F.2d 510, 511 (D.C. Cir. 1958)).

[185] *See* notes 137-46 *supra* & accompanying text. The "same or interrelated proceeding" test that has evolved in the "same order" cases actually has its origin in *Public Service Commission.* The court in BASF Wyandotte Corp. v. Costle, 582 F.2d 108, 112 (1st Cir. 1978), quoted the *Public Service Commission* test for discretionary transfers as the test for deciding whether two or more orders are the "same order" for purposes of § 2112(a). Hence, there should indeed be very little difference between the two tests.

[186] *See* text accompanying note 145 *supra.*

[187] The only relevant case is American Tel. & Tel. Co. v. FCC, 519 F.2d 322 (2d Cir. 1975), in which the FCC denied an individual rate increase to AT&T based on a previous order setting a general rate of return for that company. A petition for review of the prior order was pending in the District of Columbia Circuit. Declining to hold that the two orders were the "same order" under § 2112(a), the Second Circuit nevertheless exercised its inherent power to transfer. The court, however, indicated that, if pressed, it would have held the two

The other appellate courts have not rallied behind the narrow "same or interrelated proceedings" test espoused by the District of Columbia Circuit.[189] Only the First Circuit has shown some interest in it.[190] The Third Circuit, on the other hand, has recently adopted a test that would appear to be more liberal toward transfer than even the "familiar with the background of the controversy" test. In *United Steelworkers v. Marshall*,[191] petitions to review OSHA's lead standard were filed simultaneously in the Third and Fifth Circuits. Pursuant to an agreement between the judges of the two circuits, the Third Circuit agreed to determine which court should decide the merits of the controversy. Rather than accept jurisdiction or transfer to the Fifth Circuit, the court surprisingly transferred to the District of Columbia Circuit where no one had filed a petition for review.[192] The court noted that a petition had

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orders to be the "same order." The court stated that it viewed AT&T's argument that the two orders were not the same "as unduly restrictive." *Id.* 325. The court pointed out that the proceedings were "closely related," and that the District of Columbia Circuit was "intimately familiar with the background" of the controversy. *Id.* 327.

[188] *See* text accompanying notes 145-49 *supra*.

[189] *See, e.g.*, American Tel. & Tel. Co. v. FCC, 519 F.2d 322 (2d Cir. 1975); Farah Mfg. Co. v. NLRB, 481 F.2d 1143 (8th Cir. 1973); note 179 *supra*.

[190] The First Circuit cited the District of Columbia Circuit's "same or interrelated proceedings" test with approval in *BASF Wyandotte v. Costle*, 582 F.2d 108, 112 (1st Cir. 1978), in adopting that test for determining whether two successive orders were the same order. The First Circuit also cited the District of Columbia Circuit rule favorably in NLRB v. Bayside Enterprises, Inc., 514 F.2d 475, 476 n.* (1st Cir. 1975), for the unrelated proposition that the circuit in which the first petition is filed should decide which circuit should hear the merits. Whether that circuit will adopt the same test for deciding whether to order a discretionary transfer remains to be seen.

[191] 592 F.2d 693 (3d Cir. 1979). For a detailed discussion of the case, see text accompanying notes 35-39 *supra*.

[192] Although the court did not address the question of its authority to transfer to another court in which no petition had been filed, § 2112(a) probably gives it such authority. That statute allows transfer to "any other court of appeals." 28 U.S.C. § 2112(a) (1976). Indeed, transfer is not even limited to courts in which venue is otherwise proper: "The breadth of language and vision of § 2112 goes beyond the precipitating evil [forum shopping by agencies], as is made clear by the final clause permitting transfer for reasons of sound judicial administration,

been filed in that circuit to review a challenge to EPA's national ambient air quality standard for lead. Because both the EPA and OSHA proceedings addressed the health effects of human exposure to airborne lead, the court reasoned that there was "a strong institutional interest" in having those issues decided together in the District of Columbia Circuit.[193] The court referred to the "desirability of concentrating litigation over closely related issues in the same forum so as to avoid duplication of judicial effort." [194]

It seems clear that the *Steelworkers* case could not possibly have been transferred under the District of Columbia Circuit's "same or interrelated proceedings" test. The OSHA order was not an order entered on remand of the EPA order, nor was the OSHA order part of a "follow-on phase" of the EPA order "where continuance of the same appellate tribunal is necessary 'to maintain the continuity of the total proceeding.' " [195] The two orders were issued in two entirely separate proceedings by two different agencies under two different statutes. The only similarity between the two is that they both resolved similar factual and policy questions concerning the health effects of airborne lead. Yet the answers to these questions could very well depend upon the language of the individual statutes. For example, the standard of review under the Clean Air Act is "arbitrary and capricious," [196] whereas the Occupational Safety and Health Act standard is "substantial evidence." [197] Although the Third Circuit cited judicial economy in support of its transfer, it is not at all clear that the same District of Columbia Circuit panel will hear both cases. According to the

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notwithstanding objections, to a court which would not have had venue in the first instance." Eastern Air Lines, Inc. v. CAB, 354 F.2d 507, 511 (D.C. Cir. Cir. 1965).

[193] 592 F.2d at 698. The court pointed out that the Clean Air Act's provision for exclusive review of national ambient air quality standards in the District of Columbia Circuit, 42 U.S.C.A. § 7607(b)(1) (Supp. 1980), precluded that circuit from transferring to the circuit that heard the OSHA appeal.

[194] 592 F.2d at 697.

[195] Public Serv. Comm'n v. FPC, 472 F.2d 1270, 1272 (D.C. Cir. 1972) (quoting Pacific Gas & Elec. Co. v. FPC, 282 F.2d 510, 511 (D.C. Cir. 1958)).

[196] 42 U.S.C.A. § 7607(d)(9) (Supp. 1980).

[197] 29 U.S.C. § 655(f) (1976). It has been persuasively argued that these two standards may not differ in practice when a court is reviewing a rulemaking record. *See* Industrial Union Dep't v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974); Associated Indus. v. Department of Labor, 487 F.2d 342 (2d Cir. 1973); DeLong, *supra* note 42, at 287-89; Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. Rev. 899, 934-35 (1973). However, other subtler differences between the statutes could affect a court's role, especially in reviewing an agency's resolution of what the author has in another context called "science policy questions." *See* McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 Geo. L. J. 729, 792 (1979).

court in *Public Service Commission v. FPC,*[198] the District of Columbia Circuit has adopted a system for the selection of judges that is based on a lottery. The only exception is "for retention of the same panel that handled an earlier appeal in the same case . . . but not for reference to a panel that handled a different case on the basis of similarity of underlying questions." [199] The *Steelworkers* facts would not appear to come within this exception.

While the Third Circuit has clearly drawn a broader transfer test than the "same or interrelated proceedings" test adopted by the District of Columbia Circuit for cases in which related proceedings are currently pending in another circuit, it is not clear that the Third Circuit will extend its broad *Steelworkers* approach to cases in which another circuit has already decided a similar or related case. The court indicated that it would not have transferred to the District of Columbia Circuit if the EPA case had already been decided when it rejected judicial expertise as a transfer criterion and stated that "it would be improper to speculate that any circuit court of appeals is more expert in OSHA matters than another." [200] For the present, it is not clear which view will ultimately prevail. The Supreme Court has never examined a section 2112(a) case, and because those cases all involve preliminary skirmishes over which circuit shall hear a case, that Court is not likely to further delay the determination of the threshold question by granting certiorari in such a case.

F. *Temporary Stays*

The nature of many kinds of administrative action is such that initial steps toward compliance cannot easily be undone if a court ultimately overturns the agency's action. Hence, petitioners often ask courts to stay temporarily the effectiveness of administrative orders pending appeal. In cases involving races to the courthouse, a party occasionally must request a stay before the outcome of the race is determined, and it is not uncommon for a court to issue a stay before deciding whether to transfer the proceedings to another circuit.[201] This poses many still unanswered questions concerning the jurisdiction of the transferring court to enforce the stay after transter and the ability of the transferee court to lift the transferring court's stay. Both dilemmas strain judicial comity.[202] For example, in *Industrial Union Department v. Bingham*[203] the Fifth Circuit issued a temporary stay of OSHA's temporary emergency benzene standard on May 20, 1977, and set a date of June 6, 1977, for a hearing to determine whether the stay should be continued for the duration of the litigation. The union believed that it had filed the first petition for review in the District of Columbia Circuit, and it therefore urged the Fifth Circuit to lift the stay and transfer immediately to the District of Columbia Circuit. When the Fifth Circuit failed to do this, the union asked the District of Columbia Circuit for an emergency ex parte restraining order to prevent the Fifth Circuit petitioners from implementing the orders of the Fifth Circuit or in the alternative to dismiss their case in that circuit. The District of Columbia Circuit avoided this direct threat to judicial comity by denying the motion. Unfortunately, the court did not publish an opinion giving its reasons for doing so.[204]

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[198] 472 F.2d 1270 (D.C. Cir. 1972).

[199] *Id.* 1273.

[200] United Steelworkers v. Marshall, 592 F.2d 693, 697 (3d Cir. 1979).

[201] *See* Industrial Union Dep't v. Bingham, 570 F.2d 965 (D.C. Cir. 1977); American Pub. Gas Ass'n v. FPC, 555 F.2d 842 (D.C. Cir. 1976); Bristol Laboratories, Inc. v. Richardson, 456 F.2d 563 (1st Cir. 1971); Valley Vision, Inc. v. FCC, 383 F.2d 218 (D.C. Cir. 1967).

Perhaps because of the threat to judicial comity, no transferee court has lifted a transferring court's stay. Petitioners therefore have an additional incentive to forum shop for temporary stays. Even if a petitioner loses the race, it can still request the court of its choice to stay the administrative order pending appeal, and it can be reasonably confident that the stay will last until some court decides the merits of the controversy.

G. *Simultaneous Filings*

As the races to the courthouse have intensified it has become increasingly difficult for the courts of appeals to pick the winners. Although some courts still insist upon having a winner, even if that requires findings accurate to the hundredth of a second,[205] other courts have recognized the artificiality of such findings and have proceeded on the assumption that two petitions filed within seconds of one another are in fact simultaneous filings.[206] Recent administrative regulations that set a particular time in the future at which agency orders become ripe for judicial review[207] should eliminate races and ensure that petitions are filed in different courts within milliseconds of one another, thus frustrating even further the strict adherents to the first-to-file rule.[208] Yet as the first-to-file rule has been abandoned in tight races, new problems have surfaced in the practice under section 2112(a).

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[202] *See* notes 50-58 *supra* & accompanying text.

[203] 570 F.2d 965, 974 n.4 (D.C. Cir. 1977) (opinion of Wilkey, J.).

[204] See also Valley Vision, Inc. v. FCC, 383 F.2d 218 (D.C. Cir. 1967), in which the District of Columbia Circuit, in order to preserve judicial comity, transferred a proceeding to the Ninth Circuit (which had already issued a stay), despite the former circuit's conviction that it had exclusive jurisdiction over all petitions to review the type of FCC order under challenge.

[205] *See* text accompanying notes 97-103 *supra*. *See also* Southland Mower Co. v. CPSC, 600 F.2d 12 (5th Cir. 1979); Shell Oil Co. v. FPC, 509 F.2d 176, 179 (D.C. Cir. 1975).

When faced with virtually simultaneous filings, those courts that do not insist upon declaring a winner have proceeded directly to the question of discretionary transfer.[209] This solution, however, does not solve the threshold problem of determining which court shall decide the discretionary transfer question. The courts have apparently adopted the practice, first announced in *American Public Gas Association v. FPC,*[210] of resolving this question through informal telephone conversations between the judges of the circuits. The advantage of this approach is its speed and efficiency. The disadvantage is its secrecy. The judges decide upon the circuit that will decide the discretionary transfer question without the benefit of briefs or oral arguments; they have no announced criteria to guide their discretion; and they do not have to justify the result. On the other hand, because the process only determines which court shall determine the proper court to decide the merits, this may well be one of those trivial areas where the importance of the issue cannot justify greater procedural formality.

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[206] *See* United Steelworkers v. Marshall, 592 F.2d 693 (3d Cir. 1979); American Pub. Gas Ass'n v. FPC, 555 F.2d 852 (D.C. Cir. 1976); Municipal Distribs. Group v. FPC, 459 F.2d 1369 (D.C. Cir. 1972); International Union of Elec., Radio & Mach. Workers v. NLRB, 343 F.2d 327 (D.C. Cir. 1965).

[207] *See* note 17, *supra.*

[208] Interestingly, in the only case in which there has been a race under the recent agency "race-to-the-courthouse" designations the court still insisted that a winner be picked. In Southland Mower Co. v. CPSC, 600 F.2d 12 (5th Cir. 1979), the Fifth Circuit upheld the Consumer Product Safety Commission's determination that its order would be ripe for judicial review at 12:00 noon, Eastern Standard Time, on February 26, 1979. The court, however, found that the Fifth Circuit petitioner filed approximately one minute prior to the District of Columbia Circuit petitioner.

EPA has suggested that races may still be possible under its "race-to-the-courthouse" regulations if racers utilized "atomic chronometers synchronized to the clock at Greenwich." *Final EPA Race Regulations, supra* note 17, at 26,407.

[209] United Steelworkers v. Marshall, 592 F.2d 693 (3d Cir. 1979); American Pub. Gas Ass'n v. FPC, 555 F.2d 852 (D.C. Cir. 1976); Municipal Distribs. Group v. FPC, 459 F.2d 1367 (D.C. Cir. 1972). *But cf.* International Union of Elec., Radio & Mach. Workers v. NLRB, 343 F.2d 327 (D.C. Cir. 1965) (one of two simultaneous petitions transferred to Second Circuit because NLRB planned to petition for enforcement of the contested orders in that circuit).

[210] 555 F.2d 852, 861 app. C (D.C. Cir. 1976). *See* United Steelworkers v. Marshall, 592 F.2d 693, 695 (3d Cir. 1979).

In any event, recent judicial experience with simultaneous filings does suggest the need for establishing some agreed-upon mechanism for deciding which court shall identify the court that will decide the merits of the controversy.

III. Suggestions for Reform

A. *The Need for Reform*

The preceding analysis of current practices under section 2112 (a) reveals several strengths and weaknesses of the first-to-file rule. The rule has succeeded reasonably well at preserving judicial comity[211]—the courts have been faithful to the rule, and one court has even transferred to the court of first filing despite its conviction that it had exclusive jurisdiction.[212] Yet while strict adherence to the mechanical rule has in the past avoided unseemly judicial conflicts, the recent spate of simultaneous filings may resurrect that possibility in the future. The informal conference mechanism may break down as more agencies promulgate race-to-the-courthouse rules and thereby guarantee more numerous simultaneous filings in several circuits.

Section 2112(a) also retains the percolation and signaling[213] advantages of forum shopping. Even though the agency cannot shop, a sympathetic, but aggrieved public interest group can still win the race to a "friendly" court. Indeed, several of the important recent Supreme Court decisions in the environmental and occupational safety and health fields would probably not have been decided but for intercircuit disputes that signaled the Court of the need to grant certiorari.[214] However, the recent Third Circuit practice of ordering discretionary transfer of cases to circuits that are deciding "closely related" questions[215] may, if followed by other circuits, reduce this advantage somewhat.

These advantages of the current first-to-file mechanism do not come without great costs. Section 2112(a) exacerbates the adverse effects that forum shopping can have on the public image of lawyears and courts.[216] The thought that lawyers sometimes base their choice of forums on their assessments of the pre-existing judicial biases[217] and the sight of attorneys scrambling madly to implement their choices might tarnish the carefully cultivated image of the bar and subject its members to public ridicule.

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[211] *See* notes 50-58 *supra* & accompanying text.

[212] Valley Vision, Inc. v. FCC, 383 F.2d 218 (D.C. Cir. 1967). *But see* note 59 *supra*.

[213] *See* notes 78-82 *supra* & accompanying text.

[214] *See* note 67 *supra*.

[215] *See* notes 191-99 *supra* & accompanying text.

[216] *See* note 49 *supra* & accompanying text.

The apparent inability of some agencies to initiate a fair race with an agreed-upon starting point can likewise undermine the integrity of the administrative and judicial review process. While the agencies can justifiably bear some of the blame for unequal races,[218] much of the apparent unfairness of agency and court attempts to implement section 2112(a) is attributable to basic incompatibilities between the administrative process and the race concept. Many aspects of the administrative process are open-ended. A single proceeding can sire many orders, all of which may be ripe for appeal, but none of which may be a firm end-point from which a definitive race can be clocked. While it may seem unfair for the petitioner that challenged EPA's final regulation in *BASF Wyandotte Corp. v. Costle*[219] to learn that the race it had recently completed had ended two years previously, it does violence to the continuous character of the administrative process to insist, as that petitioner did, that EPA's interim rules were so unrelated to its final rules that review in different courts was warranted. In reality, both sets of rules were part of a continuing evaluation, prescribed by statute, of EPA's technology-based standards for the pesticides industry. This process began in 1974 when EPA was ordered by a court to promulgate "best practicable technology" effluent limitations for the pesticides industry,[220] and it will not end until 1981 or later when EPA promulgates final "best available technology economically achievable" regulations for that industry. This is not to say that there are not interim steps along the way at which EPA's actions are properly subject to judicial scrutiny; it does, however, suggest that the potential for unfairness and absurdity is high in a forum selection process that presumes that the administrative process yields discrete units of reviewable information.

Because it allows private petitioners to forum shop, section 2112(a) does nothing to discourage the threat that forum shopping poses to the uniform application of administrative legal and policy decisions.[221] Congress enacted section 2112(a) with an eye towards checking the NLRB's perceived attempts at shopping for a favorable forum for review of its unfair labor practice determinations.[222] National standard setting was not involved, and hence no particular need for uniformity existed. Yet the punishment meted out to the NLRB continues to plague the national standard-setting processes of agencies that did not even exist when the NLRB committed its alleged transgressions. While section 2112 (a) may not leave the courts powerless to consider, in ordering or refusing discretionary transfer, the effects that an adverse ruling from the transferee court might have on the agency's attempt to implement a national program, no court has yet explicitly listed this as a factor in its deliberations.[223] Fortunately, the courts have at least refused to encourage regionalistic attacks on national uniformity by declining to consider which region might be most affected in ordering discretionary transfer.[224]

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[217] *See* notes 41-42 *supra* & accompanying text.

[218] OSHA surely must take the blame for the badly bungled race in Industrial Union Dep't v. Bingham, 570 F.2d 965 (D.C. Cir. 1977). *See* text accompanying notes 20-34 and 115-19 *supra*.

[219] 582 F.2d 108 (1st Cir. 1979). *See* notes 139-44 *supra* & accompanying text.

[220] Natural Resources Defense Council, Inc. v. Train, 396 F. Supp. 1393 (D.D.C. 1975).

For the same reasons that section 2112(a) fails to encourage the uniform implementation of national programs, that section does little to reduce the business uncertainty that forum shopping can cause.[225] For issues on which the entire business world is united in its opposition to an agency's position, section 2112(a) does increase business certainty by preventing the agency from forum shopping. However, this aspect of section 2112(a) has limited value in regulatory areas, such as route allocations, that involve interbusiness rivalry or in cases in which public interest groups take the position that the agency has not done enough to protect their interests.

While one can imagine more expensive ways to channel forum shopping, section 2112(a)'s race-to-the-courthouse approach does not come cheaply.[226] The races themselves can be quite expensive. The greatest cost, however, is in the resources expended in threshold litigation over the timing of the starting gun, the outcome of the race, the scope a single or successive orders under the "same order" provision, and the advisability of discretionary transfer. Hundreds of hours of attorney and court time have been wasted in threshold litigation with no conceivable corresponding benefits to society.

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[221] *See* notes 60-73 *supra* & accompanying text.

[222] *See* Comment, *Forum-Shopping in the Review of NLRB Orders*, 28 U. Chi. L. Rev. 552, 557 n.25 (1961).

[223] One court has spoken, however, of "the need for continuity and consistency in reviewing a series of agency decisions." Abourezk v. FPC, 513 F.2d 504, 505 n.1 (D.C. Cir. 1975).

[224] *See* note 161 *supra* & accompanying text.

[225] *See* notes 74-75 *supra* & accompanying text.

[226] *See* notes 76-77 and 104-06 *supra* & accompanying text.

In sum, while section 2112(a) has retained the chief advantages of forum shopping, it has exacerabated many of its disadvantages. Moreover, that section has spawned a whole body of threshold litigation that did not exist prior to its enactment. Reform therefore seems advisable. Indeed, the trend toward promulgating race-to-the-courthouse regulations may make reform inevitable. However, in assessing proposals for reform, one must not lose sight of the magnitude of the problem. Forum shopping under section 2112(a) is not a legal problem of such major significance that it alone can justify large-scale tinkering with the currently existing system for judicial review of administrative action. Fortunately, less ambitious reforms can eliminate or greatly reduce most of the disadvantages of forum shopping while retaining most of the advantages.

B. *Patch and Repair*

Before advocating wholesale institutional change, or even minor statutory reform, one ought to explore possible corrective actions within the present judicial and administrative framework of section 2112(a). This section of the Article examines several available reforms and assesses the likelihood that they can be successfully implemented. It concludes that several possible administrative reforms can offer some improvement in the current section 2112(a) practice and that these reforms can be implemented rather easily. Reforms on a scale necessary to improve significantly the forum shopping problem, however, must await congressional action.

1. Judicial Patch and Repair

a. *Penalties for Racing*

While section 2112(a) does not discourage races, the courts could easily do so by consistently ordering discretionary transfer to the circuit of the later-filed petition whenever they suspect that the first-filed petition was the result of a race. This easily imposed judicial remedy could reduce or eliminate many of the disadvantages of forum shopping while preserving the system's capacity for "percolation" and for signaling the Supreme Court. Moreover, such transfer might be justified as "in the interest of justice."

While penalizing racers seems to be, at first glance, an attractive technique for remedying section 2112(a)'s weaknesses, it has several failings. First, it runs directly contrary to Congress's resolution of the forum shopping problem. Congress clearly saw the discretionary transfer provision of section 2112(a) as an exception to the first-to-file rule, not as an alternative mechanism that would one day supplant the rule entirely. Courts that transferred every petition resulting from a race would be effectively writing the first-to-file rule out of the statute.[227] It is also questionable whether the "in the interest of justice" rationale would support the penalizing of all racers. A relatively inexpensive race conducted in an unobtrusive manner between parties equally able to afford the cost is unjust to no private party, and has little harmful impact on society as a whole.

The most significant infirmity of the penalty approach, however, is that it probably would not work. Automatic transfer of petitions that appeared to result from races would change the nature of the races, but it would not eliminate them. Racers would have to stop filing petitions prior to reading the agency's rationale for its order, but because section 2112(a) would still reward the first bona fide filer, the race would proceed in a subtler fashion. The race might thus more closely resemble a rally than a drag race.

The second infirmity suggests a third. The courts would invariably be called upon to decide what is, and is not, a race. Resolving whether a petitioner has raced might be more difficult than deciding whether he or she has won, because it inevitably invites a probe into the alleged racer's motives. Thus, while penalizing racers might enhance the decorum of the race and save clients the expense of the sprint, it would not reduce the agency, client and court resources needed to find the proper resting place for a case, and it might even increase those costs.

Finally, penalizing racers would only act as a disincentive if penalties were uniformly and consistently applied. If one court consistently declined to transfer, forum shoppers could still race to that circuit. The courts have in the past been unwilling to penalize racers, and there is little chance that they will begin to do so absent a statutory mandate. Hence, the necessary consistency will probably not evolve without congressional action.

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[227] A similar argument could be made if a court were to rely upon its common law inherent power to transfer, *see* text accompanying note 151 *supra*, instead of § 2112(a)'s discretionary transfer provision. Such judicial action which rendered a constitutionally valid congressional statute a nullity would probably exceed the bounds of judicial discretion.

b. *Uniform Judicial Adherence to the Doctrine of Controlling Decision*

The courts could eliminate much forum shopping by eliminating the perception in lawyers' minds that it pays to shop. Professor Vestal has recently suggested that forum shopping and many other evils could be reduced or eliminated if the courts of appeals would return to their previous adherence to the "doctrine of controlling decision." [228] That doctrine holds that "as a matter of judicial comity a court should follow a decision of a court of coordinate jurisdiction on a question of law." [229] If the courts of appeals strictly adhered to this doctrine, an unfavorable legal precedent in one circuit would theoretically create no incentive to avoid that circuit in future cases, because the court that heard the second case would be bound by the first decision.

Assuming that the courts of appeals agreed in principle to abide by the doctrine of controlling decision, their action would probably have very little impact on forum shopping. The doctrine on its face applies only to questions of law. It would therefore encompass only appeals based upon the agency's statutory construction and perhaps upon the validity of the agency's procedural choices; it would have no impact at all on forum shopping for review of the record support for an agency's decision. A more serious objection is that the proposal addresses only such forum shopping as occurs after one court has rendered a decision on a legal question. Rather than discouraging forum shopping, the proposal might encourage the parties to pursue even more vigorously forum shopping for the circuit to decide the *first* case, because the stakes would be much higher. The controlling decision doctrine, if thoroughly implemented, would also eliminate forum shopping's "percolation" and signaling advantages.

The courts of appeals have shown no great respect for the doctrine of controlling decision in recent years. Professor Vestal's painstaking and comprehensive analysis of that doctrine in the eleven circuits is elegant testimony to the refusal of today's independent-minded appellate courts to adhere to it.[230] Indeed, even panels within individual circuits do not necessarily adhere to the doctrine as applied to prior decisions of other panels in the same circuit.[231] Judicial performance therefore leads Professor Vestal to the somewhat understated conclusion that "the doctrine of controlling decision may not have the vitality it once had."[232] The courts of appeals are not likely to rally round that doctrine in the near future. Even if the doctrine were somehow imposed upon them through statute or Supreme Court decision, cases are easily enough distinguished from one another that independent panels could still avoid thorough application of the doctrine, and forum shoppers would still race.

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[228] *See* Vestal, *supra* note 44, at 165. Professor Vestal recommends that the courts preclude federal agencies from relitigating legal issues that have already been decided by one circuit court. As already discussed, *see* text accompanying note 62 *supra*, this solution would be inadequate for the large number of administrative "polycentric" proceedings in which appeals may be filed by parties that are aggrieved but are in substantial agreement with the agency. This Article assumes, therefore, that the doctrine of controlling decision would apply to all parties to an administrative appeal.

[229] Vestal, *supra* note 44, at 219.

Perhaps sensing judicial reluctance to implement the doctrine of controlling decision, another commentator has suggested statutory imposition of stare decisis upon the courts of appeals as a mechanism for securing national uniformity.[233] Under this proposal an en banc holding by one circuit on a question of law would be binding upon all panels of all other circuits.[234] A subsequent court of appeals, sitting en banc, could write an opinion stating its objections to the former circuit's reasoning, but it could not reverse that circuit.[235] The dissenting opinion would act as a signal to the Supreme Court that the two circuits disagreed, and it could provide some degree of percolation.

Except for adding the percolation and signaling functions, however, this proposal retains all of the disadvantages of the controlling decision doctrine. It only discourages forum shopping for forum avoidance; the forum for the first decision becomes even more important. Parties could still forum shop for review of the record support of agency action. Finally, a court of appeals that desired to avoid the statutory rule could do so easily enough by distinguishing undistinguishable cases.

c. *More Frequent Supreme Court Review of Intercircuit Conflicts*

It has been suggested that much of the added burden on the courts of appeals that is due to intercircuit forum shopping is attributable to the Supreme Court's failure to review administrative action with sufficient regularity.[236] If litigants were assured of a high probability that their appeals would ultimately be heard in the Supreme Court, then the incentive to shop among the intermediate courts might be reduced. The Supreme Court might therefore be urged to exercise greater supervision over the lower courts to eliminate the divergencies in approach that breed forum shopping.

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[230] *Id.* 140-60.

[231] *See id.* 161; Wasby, *supra* note 44.

[232] Vestal, *supra* note 44, at 166.

[233] Note, *supra* note 81.

[234] *Id.* 1239.

[235] *Id.* 1240.

The premise of this proposal, however, is open to challenge. It is not universally true that the Court has been slow to review administrative appeals. Supreme Court review of legal questions in the environmental and occupational health and safety fields, for example, has been reasonably frequent.[237] Indeed, the Court's good record in reviewing intercircuit conflicts provides the parties with an incentive to forum shop to avoid a prior precedent, as is evidenced by the recent spate of forum avoidance attempts in those fields. Unless the Supreme Court dramatically increased the number of administrative appeals that it reviewed at the expense of other appeals involving important national issues, the possibility of Supreme Court review would have little effect on such forum shopping as is based on the general reputations of the circuits.

d. *Simultaneous Filings*

Although broad-scale attempts at judicial solutions to the forum shopping problem are probably not warranted, the courts can address the thorny problem of simultaneous filings that is beginning to imperil the workability of the first-to-file rule.[238] The courts could attempt to remedy the problem of simultaneous filings in a variety of ways. They could, for example, establish an ad hoc panel of judges from the circuits in which petitions have been filed to pass upon the discretionary transfer question. This solution, however, would merely establish a second threshold level of argument that would seem to be particularly wasteful.

A better solution would be for the courts, through the Judicial Conference, to adopt an automatic mechanism, such as a lottery, for deciding which court will make the threshold determination. In cases in which two or more petitions are filed within less than a specified fraction of a minute of one another,[239] the clerks of all courts in which petitions were filed would be required to telephone the Administrative Office of the United States Courts and apprise it of that fact. The Administrative Office could then choose the circuit to hear the threshold arguments by lot. Although there is no explicit statutory authority for this proposed solution to the simultaneous filings impasse, an arguable case can be made that the courts have authority to adopt such a mechanism under their general housekeeping statute.[240] Still, to the extent that this judicially imposed solution is inconsistent with the first-to-file rule of section 2112 (a), its validity is in doubt.[241] Ultimately, Congress has the responsibility to repair section 2112(a)'s failed mechanism.

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[236] *Id.* 1223. *See also Hruska Commission Report, supra* note 41, at 221-24, 298-99; Leventhal, *supra* note 19, at 888; Note, *supra* note 81, at 1223. *But see* G. CASPER & R. POSNER, THE WORKLOAD OF THE SUPREME COURT 91 (1978).

[237] *See* note 67 supra. The survey of agency general counsels conducted by Professors Currie and Goodman for the Hruska Commission revealed very little dissatisfaction with the Supreme Court's record in resolving intercircuit conflicts. *See* G. CASPER & R. POSNER, *supra* note 236, at 91; *Hruska Commission Report, supra* note 41, at 376-90.

[238] *See* notes 205-10 *supra* & accompanying text.

2. Agency Patch and Repair

Reacting to an anticipated flood of future courthouse races,[242] the agencies have already begun to patch the crumbling section 2112(a) edifice.[243] Two agencies have recently promulgated race-to-the-courthouse regulations that directly address the problems raised by such races, and the courts have so far viewed the regulations favorably.[244] These regulations are designed to ensure that the race is run fairly and that all parties know the precise moment at which the race begins. By setting the time for the race sufficiently far in advance these regulations also eliminate the spectacle and expense of past races. Attorneys may with the utmost decorum study the agency's regulation, write reasonably comprehensive petitions for review, and file those petitions in the forum of choice at precisely the moment that the race begins. These recent regulations are exemplary attempts to remedy past deficiencies and, in the absence of further legislation, other agencies should be encouraged to adopt similar race-to-the-courthouse regulations.

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[239] The specified fraction should depend on the accuracy of courthouse clocks. Fifteen seconds is probably a good estimate of the ability of courthouse clocks to record simultaneous events.

[240] Congress has given the federal courts the general authority to "from time to time prescribe rules for the conduct of their business." 28 U.S.C. § 2071 (1976). *See generally* 4 WRIGHT & MILLER, *supra* note 4, at § 1001; Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976).

[241] The federal housekeeping statute, 28 U.S.C. § 2071 (1976), explicitly exempts from its delegation of rulemaking authority exercises of that authority that would be inconsistent with acts of Congress.

[242] *See Judicial Review Under Clean Water Act; Races to the Courthouse, Proposed Rule,* 44 Fed. Reg. 32,006, 32,007 (1979).

[243] Agency efforts to address courthouse races have received the encouragement of the courts. *See* Industrial Union Dep't v. Bingham, 570 F.2d 965, 970 (D.C. Cir. 1977) (opinion of Leventhal, J.).

[244] *See* note 17 *supra*.

The agencies can, however, do even more to alleviate problems that have arisen under section 2112(a). The agencies could significantly aid the courts in resolving questions concerning the scope of agency orders[245] and the status of successive orders[246] by addressing these questions prior to appeal. For example, when an agency simultaneously issues what looks like several orders at the end of a single proceeding, as in *Bristol Laboratories, Inc. v. Richardson,*[247] the agency could simply state at the outset that it considered all of the orders the "same order" for purposes of section 2112(a). Similarly, when an agency in a continuing proceeding issues a successive order before the appeal of a prior order from the same proceeding has been decided, the agency could at the time it issues the second order state its determination that they are both the "same order."

One serious objection to this proposal is that critics could charge the agency with attempting to usurp the courts' power to interpret section 2112(a). An initial agency assessment, however, would not purport to bind the reviewing courts; it would merely be an attempt to aid the courts in resolving a difficult threshold question. The courts would presumably give some deference to those initial agency determinations, because the agencies are familiar with their own statutes and their unique procedural peculiarities. In upholding the CPSC and EPA race-to-the-courthouse requirements, both the Fourth and Fifth Circuits stressed that "[a]gencies have a great deal of discretion in determining the manner in which their actions are promulgated."[248] The courts should show similar deference to agency attempts to define the scope of their orders.

Another objection to this proposal is that, in the case of successive orders, agencies may use their power to determine the scope of facially separate orders as a means of forum shopping in derogation of the clear intent of section 2112(a) that they not be allowed to do so. If the agency were pleased with the circuit reviewing the first order, it could mark successive orders the "same order" as the first so that they too would be reviewed by that circuit. If, however, the agency were unhappy with the forum for review, it could call successive actions separate orders in the hopes that a non-adverse party will this time win any ensuing race. The incentive to forum shop in this manner, however, is not very strong. The agency would know which court was deciding the first appeal, but it would not know how that court decided.[249] There may be a temptation here for the agency to take that court's general reputation into account in making its "same order" determination, but it should not be very strong in light of the convenience to the agency itself of arguing both appeals at the same time in the same place. Moreover, the agency should have some incentive to resist that temptation in order to maintain consistency in making "same order" determinations through time. Finally, judicial review of the "same order" determination, though deferential, should be capable of curing agency abuses. In sum, agency "same order" determinations could substantially aid the threshold process in the few cases that call for that determination without much risk of doing violence to the intent of section 2112(a).

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[245] *See* notes 129-36 *supra* & accompanying text.

[246] *See* notes 137-49 *supra* & accompanying text.

[247] 456 F.2d 563 (1st Cir. 1971).

[248] Virginia Elec. & Power Co. v. EPA, 610 F.2d 187, 188 (4th Cir. 1979) (quoting Southland Mower Co. v. CPSC, 600 F.2d 12, 13 (5th Cir. 1979)).

C. *Statutory Reforms*

Because agency and judicial patch and repair efforts are not likely to remedy many of the problems that have arisen in the section 2112(a) practice, statutory changes should be considered. In considering statutory changes, however, one should bear in mind that the current section 2112(a) practice, while nettlesome and professionally embarrassing, is not a major social problem. Proposals for statutory reform must reflect the modest nature of the problem that they address.

Proposals for statutory reform could attempt either to eliminate forum shopping entirely, or merely to manage it by eliminating some of its more unseemly and wasteful aspects. It is difficult, however, to envision a reasonably workable scheme for eliminating forum shopping outright that does not simply designate a single court of appeals to hear all administrative appeals of a certain type. Even the most careful delineation of the kinds of cases for which a particular court had exclusive venue would probably still breed threshold litigation; moreover, this would generally require Congress to choose sides in controversies over which court ought to have exclusive venue. Proposals for managing or controlling forum shopping are probably more politically palatable, but they leave the underlying problem unresolved and therefore require constant vigilance to guard against predictable efforts to avoid the control mechanisms.

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[249] If the appeal of the first order has been decided, then the first and second orders can not as a matter of judicial fiat be considered the "same order." *See* notes 145-49 *supra* & accompanying text.

The following section of this Article examines and evaluates several proposals for eliminating or controlling forum shopping. It concludes that no acceptable mechanism for eliminating forum shopping is presently available. Of the control mechanisms an automatic mechanism seems preferable to proposed discretionary mechanisms.

1. Mechanisms for Eliminating Forum Shopping

a. *Exclusive Venue in a Particular Court*

Perhaps the most effective way to eliminate forum shopping is to limit the available forums to a single court. This could be accomplished either by designating one of the existing courts of appeals as the exclusive forum for some or all administrative appeals or by creating a new "administrative court."[250] Designating a single court to hear all appeals of a particular variety eliminates the cost and embarrassment of the race to the courthouse and much of the cost of litigating threshold matters. By allowing simultaneously pending cases involving the same or very similar legal and factual questions to be consolidated for argument before the same panel of that court, the proposal could even further increase judicial economy. Because only one court would have jurisdiction to hear particular appeals, there would likewise be no threat to judicial comity. Moreover, to the extent that panels within the single court would maintain consistency, this solution should reduce business uncertainty[251] and encourage uniform application of national policy.[252] Exclusive venue in a particular circuit is especially appropriate for programs for which Congress has imposed deadlines upon the agency and the regulated industry, because the uncertainty and delay attributable to conflicting court decisions that result from forum shopping can frustrate such deadlines. An added advantage of exclusive review, unrelated to its effects on forum shopping, is the possibility that it would relieve the rest of the courts of appeals from some of their burdensome caseloads.[253]

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[250] This is by no means the first attempt to analyze the arguments for and against designating an exclusive forum for judicial review of administrative action. The author has relied heavily on the following sources: P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL (1976) [hereinafter cited as JUSTICE ON APPEAL]; COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, HEARINGS SECOND PHASE 1974-1975, at 357 (1974) (testimony of A. Scalia) [hereinafter cited as COMMISSION ON REVISION]; GENERAL VIEW, *supra* note 81; Carrington, *supra* note 74; Currie & Goodman, *supra* note 3; Leventhal, *supra* note 19; Nathanson, *The Administrative Court Proposal,* 57 VA. L. REV. 996 (1971).

[251] *See* Leventhal, *supra* note 19, at 884.

[252] *See* GENERAL VIEW, *supra* note 81, at 186; Currie & Goodman, *supra* note 3, at 63; Nathanson, *supra* note 250, at 1010; *Vestal,* supra note 44, at 176.

On the other hand, vesting exclusive jurisdiction in a single court would completely deny the Supreme Court the percolating and signaling advantages of multi-circuit review.[254] To the limited extent that convenience to the parties is a realistic concern,[255] exclusive jurisdiction in a single court could cause inconvenience to some parties.[256] Moreover, while vesting exclusive jurisdiction may take pressure off some courts, it will of course add to the pressure of the courts receiving exclusive jurisdiction.[257] Even if a new "administrative court" is created to hear all administrative appeals, its caseload could easily match the current caseload of the District of Columbia Circuit.[258] Still another danger of vesting exclusive review in a single court is the possibility that over time the relationship between the two institutions would either blossom or sour to such an extent that the court would be either too hesitant or too eager to reverse agency decisions.[259] In either case, the nature of judicial review of administrative action might change if a substantial number of administrative appeals were heard in a single circuit. Moreover, vesting exclusive venue in a single court for preenforcement review of major regulations would leave unanswered the question whether district courts and other appellate courts could reconsider the validity of the regulation at the enforcement stage. If the validity of regulations is open for review at the enforcement stage, the potential still exists for conflicting decisions despite the attempt to achieve uniformity through exclusive venue.[260]

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[253] *See* Commission on Revision, *supra* note 250, at 359; General View, *supra* note 81, at 184; Currie & Goodman, *supra* note 3, at 64; Nathanson, *supra* note 250, at 996. There is, however, some debate as to just how much this would free up the appellate courts. Clearly, designating particular courts of appeals as exclusive courts to hear particular administrative appeals would reduce the load on the courts as a whole only to the extent that forum shopping presently accounts for additional cases. Even if an entirely new "administrative court" were created, the net reduction in the workload of the courts of appeals would apparently be of little significance. *See* Commission on Revision, *supra* note 250, at 359 (estimating nine percent reduction in federal appellate caseload); Currie & Goodman, *supra* note 3, at 64; Nathanson, *supra* note 250, at 997. Assuming that 1,400 cases of nationwide scope or effect in 1979 might have been shifted into an "adminisrative court," *see* text accompanying notes 265-67 *infra*, the administrative court in 1979 would only reduce the total workload of the appellate courts by approximately seven percent of its current 20,219 petitions. Administrative Office of the United States Courts, 1979 Annual Report of the Director 44, table 2 [hereinafter cited as AO Rebort]. Indeed, even shifting *all* of the 2,922 appeals from administrative agencies would only reduce the workload by 14 percent.

[254] *See* Currie & Goodman, *supra* note 3, at 69; Note, *Forum Shopping in Appellate Review of FTC Cease and Desist Orders*, 13 Utah L. Rev. 316, 338 (1968).

[255] *See* text accompanying notes 156-58 *supra*.

[256] *See* Carrington, *supra* note 74, at 605; Currie & Goodman, *supra* note 3, at 74; Note, *supra* note 254, at 337.

[257] See Justice on Appeal, *supra* note 250, at 171; Carrington, *supra* note 74, at 605; Currie & Goodman, *supra* note 3, at 64.

[258] In fiscal 1979, 1,415 petitions were filed in the District of Columbia Circuit. AO Report, *supra* note 253, at 44, table 2. An estimated 1,000 to 1,400 cases would be heard by a court hearing only appeals from agency actions having nationwide scope of effect. *See* text accompanying notes 265-67 *infra*. If the "administrative court" heard all 2,922 agency appeals, AO Report, *supra* note 253, at 49, table 6, its caseload would be exceeded only by that of the Fifth Circuit. AO Report, *supra* note 253, at 44, table 2. (The Ninth Circuit had 3,010 filings, but 471 of those were agency appeals, which would have gone to the "administrative court.").

Perhaps the greatest disadvantage of vesting a single court with exclusive jurisdiction over some or all administrative appeals is the difficulty of defining that court's jurisdiction accurately enough to preclude wasteful threshold litigation over jurisdictional matters.[261] At one extreme Congress could amend the venue provisions of every statute that currently provides for court of appeals review of administrative action to specify a particular circuit for each agency action. While this approach should eliminate any threshold jurisdictional litigation, it would be extraordinarily cumbersome, and would undoubtedly touch off numerous congressional disputes over which courts should have exclusive jurisdiction over which appeals. Congress could, alternatively, draft a statute that would provide for exclusive venue in a single court for all administrative appeals over which federal courts of appeals have jurisdiction. This approach, however, would burden a single court with hundreds of appeals, such as from NLRB unfair labor practice findings, that have minimal, if any, national significance, and could force local litigants to argue their appeals in distant forums.

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[259] *Compare* Fels, *supra* note 85, at 46 *and* Nathanson, *supra* note 250, at 1012-14 *with* Currie & Goodman, *supra* note 3, at 71.

[260] Congress could attempt to resolve the problem of review at the enforcement stage in one of two ways. First, Congress could simply prohibit such review, as it has done in the Clean Air Act, which precludes review in enforcement proceedings of actions with respect to which pre-enforcement review could have been obtained. 42 U.S.C.A. § 7607(b)(2) (Supp. 1980). This solution, however, might be viewed as unfair by regulatees who do not regularly read the *Federal Register*. Second, Congress could ensure uniformity by mandating that enforcement actions take place only in the circuit in which the pre-enforcement appeal was heard. This solution seems awkward at best and very inconvenient at worst; it makes little sense to require an agency to try in the District of Columbia Circuit an enforcement case involving conduct occurring in California simply because the regulation under which the enforcement action arises survived judicial review in the District of Columbia Circuit.

[261] *See* JUSTICE ON APPEAL, *supra* note 250, at 170; COMMISSION ON REVISION, *supra* note 250, at 360; Currie & Goodman, *supra* note 3, at 73-74.

A compromise might be a statute that would vest exclusive venue for all appeals from administrative actions having "national significance" in a single court. Such a statute would reflect the policy judgment that here the percolation and signaling advantages of forum shopping must take a back seat to the need for national uniformity and business certainty. Congress has in fact attempted this approach in its most recent amendments to the Clean Air Act, which provide for exclusive review of actions that the Administrator finds to be of "nationwide scope or effect" by the District of Columbia Circuit.[262] Unfortunately, terms like "national significance" and "nationwide scope or effect" still beg for wasteful threshold jurisdictional litigation.[263] Congress could perhaps discourage some threshold litigation by providing, as it apparently did in the Clean Air Act, for the agency to make an unreviewable determination of "national significance." Private litigants, however, might oppose placing the threshold determination in the agency's hands on the ground that it would allow the agency to forum shop for review by the District of Columbia Circuit.

Despite the disadvantages of this compromise solution, it remains an attractive possibility. Congress has on many occasions vested exclusive review of administrative action in particular courts[264] without an inordinant amount of threshold jurisdictional litigation. If only agency actions having nationwide scope or effect were reviewable in a single court the burden may not be as great as some commentators fear. Of 2,922 petitions for review of administrative agency proceedings filed in the federal appellate courts in fiscal 1979, over forty percent were petitions from NLRB and IRS actions, six percent were from the Immigration and Naturalization Service, and another five percent arose out of the occupational safety and health field.[265] Practically none of these appeals involved an issue of nationwide scope or effect.[266] Hence, easily fifty percent of the petitions for administrative review filed last year did not involve actions having nationwide significance. Yet as many as 1,400 and probably more than 1,000 cases potentially did meet that test. The District of Columbia Circuit, the busiest circuit for administrative review, had only 666 administrative review petitions in 1979.[267] Vesting that court with exclusive jurisdiction over appeals from agency actions of nationwide scope and effect could potentially double its administrative appeals caseload. On the other hand, if an entirely separate "administrative court" were created, its caseload of as high as 1,400 cases would be less than the total caseloads of seven of the eleven circuits.[268] Nevertheless, because administrative appeals of national significance are generally more technical and time consuming than other appeals, many of which can be disposed of summarily, an administrative caseload of 1,000-1,400 cases could be extraordinarily burdensome.

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[262] 42 U.S.C.A. § 7607(b)(1) (Supp. 1980).

[263] Professor Currie suggests the case in which a national standard for gold mines has practical application only in three of the 11 circuits. Currie, *supra* note 6, at 1267. Such a standard would not have nationwide effect, but it would have nationwide scope, and would therefore seem to be reviewable only in the District of Columbia Circuit. This result, however, is certainly open to question.

[264] *See, e.g.,* 42 U.S.C. § 4915(a) (1976) (exclusive review in District of Columbia Circuit of Noise Act standards); 42 U.S.C.A. § 7607(b)(1) (Supp. 1980) (exclusive review in District of Columbia Circuit of certain Clean Air Act standards); 47 U.S.C. § 402(b) (1976) (exclusive review in District of Columbia Circuit of FCC license denials).

[265] AO Report, *supra* note 253, at 49, table 6.

[266] Virtually all NLRB, IRS and INS appeals involve agency actions directed at individual employers, unions, taxpayers or aliens. Although some occupational safety and health appeals involve national regulations promulgated by OSHA, *see*

b. *Exclusive Venue in the Courts of the "Affected Regions"*

Congress could effectively reduce, though not eliminate, forum shopping by requiring transfer to a court of appeals according to a single criterion. A recently introduced bill, for example, would amend section 2112(a) to require the court in which the first petition was filed to determine whether a "substantial portion of the impact or injury" of the administrative action was in one or more judicial circuits; if so the court would be required to transfer to one of those circuits.[269]

Advantages accruing from such a proposal, however, are more apparent than real. Convenience of the parties,[270] to the extent that it is a substantial concern,[271] would be furthered only if at

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29 U.S.C. § 655(f) (1976), the bulk of the appeals are from the Occupational Safety and Health Review Commission, which adjudicates civil penalty actions directed at individual violations of OSHA standards or of the Act's general duty clause. *See* 29 U.S.C. § 660 (1976). This is not to say, of course, that individual determinations may not have precedential significance or nationwide scope and effect.

[267] AO REPORT, *supra* note 253, at 49.

[268] *Id.* 44.

[269] S. 739, 96th Cong., 1st Sess. § 3 (1979). The Senate Judiciary Committee has reported a similar bill that would amend § 2112(a) to list the regional impact of the agency action as a transfer criterion along with the convenience of the parties and the interest of justice. S. 2147, 96th Cong., 2d Sess. § 218(c) (1980). *See also* H.R. 6782, 96th Cong., 2d Sess. (1980) (amending 28 U.S.C. § 1391(e) (1976)).

[270] *See* 125 CONG. REC. S3188 (daily ed. March 22, 1979) (statement of Sen. Laxalt) [hereinafter cited as Laxalt Statement]; *id.* S9126 (daily ed. July 10, 1979) (statement of Sen. DeConcini) [hereinafter cited as DeConcini Statement].

[271] *See* notes 153-58 *supra* & accompanying text.

least some of the parties were located in the chosen circuit.[272] This is not necessarily the case.[273] The percolation and signaling functions of multi-circuit review would not necessarily be preserved[274] because the proposal might just as easily result in all appeals on a given issue being heard by a single circuit court of appeals.[275]

Not only do the advantages of the "affected region" approach appear illusory, the scheme also has very authentic disadvantages. First, because the current proposals would merely amend the discretionary transfer section of section 2112(a) to make transfer nondiscretionary, they would preserve the race to the forum that makes the "affected region" determination. Litigants would probably view one court as more liberal than another in transferring under this test, and the race, with all its attendant costs, embarrassments, and threats to judicial comity, would thus survive, though perhaps in a somewhat attenuated form. This could be partially remedied by simply limiting venue in the first instance to "affected regions," but to the extent that the parties perceived differences between two circuits that met the "affected regions" test there would still be forum shopping attempts, and a mechanism would have to be devised to deal with them.

Even assuming no races to the courthouse, the proposals would guarantee that many client, government, and judicial resources would be expended in virtually every contested case in deciding whether "a substantial portion of the impact or injury" of the administrative action would occur in one or more circuits.[276] For example, the proposal does not specify whose injury must be examined in deciding where the impact or injury occurs. While a substantial portion of the economic impact of a regulation limiting sulfur dioxide emissions from new copper smelters would probably be in one or more of the western circuits, a substantial portion of the environmental injury due to acid rain caused by copper smelters could occur in one of the midwest or eastern circuits. Furthermore, the proposal provides no mechanism for determining which of two or more circuits that meet the test will hear the merits of the appeal. Hence, even after a court makes the threshold "affected region" determination, it may be required to make an additional, essentially discretionary, choice between two or more qualifying circuits. In sum, the "affected region" test would result in loosely confined threshold litigation, "precisely the kind of litigation that venue statutes are intended to avoid." [277]

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[272] Indeed, the proposed amendment to § 2112(a) as written would apparently require transfer to a "substantially affected" circuit even if it did not have jurisdiction to hear the case. *See* Testimony of Assistant Attorney General James W. Moorman before the Subcommittee on Judicial Improvements of the Senate Judiciary Committee (Feb. 20, 1979), *reprinted in* Legal Times of Washington, Feb. 25, 1980, at 21, col. 1 [hereinafter cited as Moorman Testimony]. This defect, however, could be cured by providing only for transfer to a circuit in which a petition had been filed and in which jurisdiction was proper.

[273] *See, e.g.,* Moorman Testimony, *supra* note 272, at 22; Marcus, *Environmentalists Lash Out at Bills Curbing D.C. Venue,* Nat'l L.J., March 3, 1980, at 4, col. 2 (quoting William A. Butler, General Counsel of the Environmental Defense Fund).

[274] *See* DeConcini Statement, *supra* note 270, at S9126.

[275] For example, one can easily imagine the Tenth Circuit becoming, under the "regional impact" test, the exclusive circuit for review of all agency actions affecting the development of shale oil, because the vast bulk of shale oil reserves are located in Colorado, Utah and Wyoming.

[276] *See* Moorman Testimony, *supra* note 272.

2. Managing Forum Shopping

Should Congress determine that the available mechanisms for reducing or eliminating forum shopping for review of administrative action are not feasible, it might still attempt to reduce or eliminate some of the more wasteful and unseemly aspects of the current practice under section 2112(a). At least two models for managing forum shopping are available. Congress could vest a single body with authority to decide, according to specified criteria, which of the available courts of appeals should decide the merits of the controversy. Alternatively, Congress could eliminate the need for any intermediate decisionmaker by specifying an automatic mechanism, such as a lottery or a nonperiodic rotation, for determining which of the available courts will hear the merits of an appeal.

a. *Discretionary Mechanisms: The Multi-district Panel Proposal*

Should Congress opt for a discretionary mechanism, it might adopt a recent proposal to lodge the threshold decision in a special panel such as the judicial panel on multi-district litigation.[278] The judicial panel on multi-district litigation presently consists of "seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit." [279] The business of that panel is to transfer civil actions "involving one or more common questions of fact" [280] that have been filed in two or more district courts to a single court for the conduct of pretrial proceedings. Congress established the panel to increase judicial efficiency in supervising pretrial activities, to eliminate the potential for conflicting district court pretrial rulings, and to reduce inconvenience to parties and witnesses.[281] Although these do not precisely coincide with the purposes of section 2112(a), the multi-district panel plays a role that is similar to that of a circuit court deciding the discretionary transfer question under that section. Congress might, therefore, simply eliminate the first-to-file rule and instead require that all petitions that have been filed in more than one court during the statutory filing period be transferred initially to the panel on multi-district litigation for retransfer according to specified criteria.[282]

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[277] Currie, *supra* note 6, at 1266.

Current proposals for vesting venue exclusively in circuits in which a substantial portion of the impact or injury occur are apparently designed solely to avoid the District of Columbia Circuit. *See* Laxalt Statement, *supra* note 270, at S3188 ("[T]he precedent in the District of Columbia Circuit more precisely reflects the attitudes of the Federal Government"); Statement of former Utah Governor Calvin L. Rampton, *quoted in* Marcus, *supra* note 273, at A4, col. 2 ("It is difficult for a judge whose entire experience has been in water-abundant areas of the nation adequately to set in proper perspective the evidence and law if he has no exposure to the . . . water-short areas of our nation.").

[278] *See* Ross & Goldman, *supra* note 42, at 27, col. 1; Haworth, *Modest Proposals to Smooth the Track for the Race to the Courthouse*, 48 GEO. WASH. L. REV.

This relatively simple mechanism would eliminate the race to the courthouse with its attendant expense, potential for unfairness, and embarrassment, because there would be no advantage in being the first to file. The proposal also provides a convenient solution to the "same order" problem, because the pendency of the same or

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211 (1980); Office for Improvements in the Administration of Justice, U.S. Dep't of Justice, Proposal for Improvements in the Federal Appellate Courts, Proposal 7, at 2 (June 21, 1978) [hereinafter cited as Justice Department Proposal]; Letter from Wm. Warfield Ross to Richard K. Berg, Executive Secretary, Administrative Conference of the United States (Jan. 10, 1980) (on file at U. Pa. L. Rev.) [hereinafter cited as Ross Letter]. Ross and Goldman make two alternative proposals for ending the race to the courthouse [hereinafter referred to as "Ross Proposal 1" and "Ross Proposal 2"]. Ross Proposal 1, relevant here, would have the panel on multi-district litigation determine which circuit should hear the merits based on a consideration of the following factors:

> (i) the interest of the party most aggrieved by the agency order, (ii) the pendency of related proceedings, (iii) the local nature of the subject matter of the agency order, and (iv) the interest of the public at large; or where none of the foregoing are relevant, by (i) the facilitation of judicial administration and (ii) such other considerations as may be relevant.

Id. 3-4.

Ross Proposal 2 would have the agency choose the forum on the basis of the same considerations.

[279] 28 U.S.C. § 1407(d) (1976).

[280] *Id.* § 1407(a).

[281] *See* Comment, *The Experience of Transferee Courts under the Multidistrict Litigation Act,* 39 U. Chi. L. Rev. 588, 590-91 (1972). In actual practice the transfer has often resulted in the case coming to its conclusion in the transferee court. *Id.* 607-09.

[282] *See* Ross Proposal 1, *supra* note 278.

interrelated proceedings in one circuit could be one of the criteria for transfer. Finally, if Congress were willing to give the multidistrict panel the authority to issue stays pending resolution of the threshold question, this proposal could also solve the problem of temporary stays.[283]

The proposal, on the other hand, does not necessarily secure uniform application of national policy and reduce business uncertainty, because it would still allow forum shopping. The proposal would only eliminate the initial race; the parties would still have the opportunity, and in fact the obligation, to press for discretionary transfer. Unless one of the criteria for transfer is the potential of the transferee court to ensure uniformity, a criterion that is not listed in any of the current proposals,[284] the panel approach would not be expected to further the uniformity and business certainty policies. By the same token, the proposal has the corresponding advantage of preserving the percolation and signaling advantages of multi-circuit review.

The greatest disadvantage of the independent panel approach to deciding the threshold question is its potential to consume large amounts of client and judicial resources. While the proposal would eliminate the expense of the race, it would probably increase the cost of discretionary transfer litigation. In many cases under section 2112(a) the parties do not press for discretionary transfer once the outcome of the race has been determined. The panel proposal, however, would guarantee threshold litigation in every case in which two petitions are filed in different circuits. Moreover, the criteria for transfer,[285] while similar to those articulated by the courts in section 2112(a) litigation,[286] are extremely malleable and hence subject to intense dispute on a case-by-case basis.[287] Even though only a single panel would decide such cases, it is unlikely that a well-settled "law of discretionary transfer" would ever evolve. Furthermore, some of the suggested criteria, such as the relative aggrievement of the parties and the local nature of the subject matter, would occasionally call for factual inquiries or at the very least for time-consuming scrutiny of the administrative record. Finally, the combination of the amount and intensity of the litigation that could be expected to result from the proposal's adoption would virtually guarantee that the panel could not expeditiously dispose of the transfer cases. Briefing, arguing, and deciding such cases could consume months. In addition to the direct costs of the proceedings, the delay itself could in many cases cause great loss to one or more of the parties.[288]

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[283] *See* notes 201-04 *supra* & accompanying text.

[284] Ross Proposal 1 lists "the interest of the public at large" as a criterion. Conceivably the interest of the public at large would be furthered by the uniform application of national policy. One could more directly ensure consideration of this policy by listing as a criterion "the potential of the transferee court to ensure uniformity." *See* note 278 *supra*.

[285] *See* note 284 *supra*.

[286] *See* notes 150-200 *supra* & accompanying text.

[287] In fact, enterprising attorneys are sure to turn these transfer criteria into a charade by disingenuously arguing that justice or convenience requires transfer when their sole motivation for so arguing is the desire to have the merits heard in a friendlier forum. *See* note 42 *supra*.

b. *Discretionary Mechanisms: Transfer Criteria*

In spite of these flaws, Congress could still choose a discretionary transfer mechanism as a partial solution to the forum shopping problem. The success or failure of such a mechanism might depend upon the effectiveness and fairness of the criteria chosen to guide the multi-district panel in making the transfer determination. It is therefore necessary to examine several recently proposed criteria, most of which have already been suggested by the courts in deciding cases under section 2112(a).

(i) Judicial Expertise

The recent proposal that the "application of judicial expertise" be a criterion for ordering discretionary transfer[289] is as novel as it is intriguing. The courts have consistently refused to adopt the concept of "specialization of tribunals."[290] Yet adopting "judicial expertise" as a criterion for transfer would inevitably lead the courts in the direction of specialization. After a court had decided one or two cases under a particular regulatory scheme, it could expect, other things being equal and venue being proper, to receive subsequent cases under the same regulatory scheme.

Applying "judicial expertise" as a transfer criterion could have several advantages. Allowing the judges that have familiarized themselves with a regulatory scheme to continue to hear cases arising out of that scheme could increase judicial efficiency. Under present court of appeals assignment policies, however, this purported advantage of "judicial expertise" transfer is illusory, because there is no guarantee that the same panel in the transferee circuit would hear all appeals arising out of a single statutory scheme or even out of a single administrative proceeding.[291] Obviously it would take a large number of cases to ensure that *all* of the judges in a circuit acquired expertise in the ins and outs of a regulatory scheme. A given panel could probably learn as much from the experience of a panel in another circuit as it could learn from the experience of a panel in its own circuit. Apart from its experience in deciding cases under a statutory scheme, there is no reason to suppose that one court of appeals is likely to have more "judicial expertise" than another. There is little indication that any judge is chosen for a particular circuit because his or her background indicates an expertise that might be useful in that circuit. Hence, the whole concept of "judicial expertise" lacks any practical meaning in a system in which courts are composed of many generalist judges, any three of whom may hear a given case on a given day.

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[288] *See* Fels, *supra* note 85, at 49. The identity of the party harmed by the litigation delay would depend upon whether or not the agency or the multi-district panel stayed the effectiveness of the agency action. In either case delay could have a financial or physical impact on at least one of the parties.

[289] *See* Justice Department Proposal, *supra* note 278, at 3; Note, *Venue for Judicial Review of Administrative Actions: A New Approach*, 93 HARV. L. REV. 1735 (1980).

[290] *See* note 174 *supra*.

If "judicial expertise" were nevertheless adopted as a criterion the multi-district panel could ignore the above objections and simply impose specialization by brute force. All FCC and EPA cases might be sent to the District of Columbia Circuit because that circuit already is required by statute to hear many cases arising from those agencies.[292] All SEC cases could be sent to the Second Circuit, because that circuit includes Wall Street. Department of Interior and Park Service cases could be routed to the Tenth Circuit, energy cases to the Fifth Circuit and so on. After a sufficient number of transfers the courts might indeed become expert tribunals. But this is not guaranteed, because there is no assurance that venue will always, or even usually, be proper in the "expert" circuit.[293] Additionally, to the extent that the "judicial expertise" criterion, where applicable, did not always prevail over the other discretionary criteria, still further transfers could go to "nonexpert" circuits.

Assuming that expert courts would nevertheless evolve, it is certainly debatable whether the advantages of the resulting system would outweigh its disadvantages. The "expert" courts could potentially acquire the same narrowness of view and biased perspective that argues against the proposal for vesting exclusive venue in a single court.[294] In any event, that balance is probably best struck by Congress in individual venue statutes and not by a multi-district panel applying a "judicial expertise" criterion.

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[291] This point has been largely ignored by the critics of agency relitigation.

[292] *See* note 264 *supra.*

[293] Venue is generally determined by reference to the particular agency statute. *See* note 40 *supra.*

(ii) Pendency of Same or Similar Proceeding

If the first of two successive orders is currently pending in one court of appeals at the time the multi-district panel is required to decide where to lodge the subsequent order, the panel obviously should take that factor into consideration. Indeed, under the "same or interrelated proceedings" test for the definition of the "same order," [295] this should be the *only* criterion applied. To advance judicial economy and to eliminate the threat of inconsistent rulings on the "same order," the multi-district panel should follow the current practice of the circuit courts [296] and transfer the proceeding to the court in which an appeal concerning the "same order" is currently pending. The cases would then presumably be consolidated for a single decision by a single panel. In addition, the previous suggestion that the agencies adopt the practice of specifying whether simultaneous or successive orders are the "same order" is equally applicable here.[297]

The considerations, however, are different when the first court has already decided a case involving similar issues or when a petition that does not involve the "same order" is currently pending before another court. In neither of these cases would consolidation necessarily preserve judicial economy. As previously discussed,[298] there is no guarantee that the same panel in the transferee circuit would hear both cases. Moreover, especially when a prior decision has already been rendered, failure to transfer poses no threat to judicial comity, because by definition the proceedings do not involve the same agency action. The second court might reject the first court's reasoning, but it theoretically would not be directly contradicting the mandate of the prior circuit.

(iii) Comparative Aggrievement

The courts of appeals in two cases have ordered discretionary transfer on the ground that the first petitioner was not sufficiently

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[294] *See* text accompanying note 259 *supra.*

[295] *See* notes 137-49 *supra* & accompanying text. There appears to be no good reason why the "same or interrelated proceedings" test would not prove as serviceable to the multi-district panel as it has been to the courts of appeals.

[296] *See* text accompanying notes 137-44 *supra.*

[297] *See* text accompanying notes 245-49 *supra.*

[298] *See* text accompanying notes 145-49 *supra.*

"aggrieved" by the agency's action.[299] However, the courts have on many occasions stated that this ground should only be used where the "inconsequential" character of the petitioner's aggrievement is clear from the petitioner's own stipulation, pleading or representation.[300] Despite the courts' past reluctance to rely upon this criterion, "the interest of the party most aggrieved" has been suggested as a criterion for use by the multi-district panel in deciding upon the appropriate transferee court.[301]

Listing "comparative aggrievement" as a transfer criterion would discourage some forum shopping by parties who were substantial winners at the agency level. It would likewise implement the policy currently underlying section 2112(a) of preventing the agency from choosing the forum. If "comparative aggrievement" were a criterion, a party would have no incentive to intervene in the administrative proceeding on the side of the agency staff solely for the purpose of choosing a review forum that was believed to be sympathetic to the agency's position. Judicial insistence that a petitioner have standing does not really remedy the problem of frivolous forum shopping petitions, because the standing determination is usually made after the court has accepted jurisdiction and has begun deciding the merits of the controversy. Because the court will generally not dismiss the case on the ground that one party lacks standing so long as its opponent is aggrieved by the agency decision, the unaggrieved petitioner can as a practical matter pick the forum in the absence of a mechanism that weeds out frivolous petitions at the outset.

While it may make sense to penalize an unaggrieved petitioner by denying it the forum of its choice, it makes much less sense to advocate that the relative "aggrievements" of the various petitioners be examined as a threshold matter. Such an examination would require the body making the threshold determination to launch a detailed and probing inquiry into the merits of the controversy. The experience of the court in *Insurance Workers International Union v. NLRB* [302] should adequately demonstrate the extent to which a court must explore the proceedings below in order to apply this criterion, even in easy cases in which the petitioner's claim to have standing is very tenuous. Requiring the courts to ascertain the party "most aggrieved" by the agency action, however, goes far beyond even *Insurance Workers.* That court only decided that an unaggrieved party should not have its choice of forum. The facts did not require the court to examine the aggrievement of the other petitioners. Making *comparative* aggrievement a criterion for discretionary transfer would require a threshold look at the alleged aggrievement of all petitioners. It would also invariably require value judgments as to the nature and extent of petitioners' harms. In *International Union Department v. Bingham,*[303] for example, the petroleum industry petitioners alleged that their aggrievement was far more substantial than that of the union. The petroleum industry stood to lose half-a-billion dollars if OSHA's benzene standard were upheld, whereas the union's complaint with the standard was that it did not go far enough in protecting benzene workers. Even though the union agreed with the agency action in almost all particulars its position was that the agency's failure to adopt the union's position in its entirety could result in the risk of additional deaths among benzene workers, an "aggrievement" that, if true, would appear to be substantial under any conceivable test. The petroleum industry petitioners, of course, disagreed. But, as Judge Leventhal recognized, a threshold hearing on discretionary transfer is hardly the place for resolving these weighty contentions.

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[299] *See* note 163 *supra.*

[300] *See* notes 167-68 *supra* & accompanying text.

[301] *See* Ross Proposal 1, *supra* note 278. *See also* Justice Department Proposal, *supra* note 278, at 3.

[302] 360 F.2d 823 (D.C. Cir. 1966). *See* text accompanying notes 164-68 *supra.*

Congress could perhaps preclude extensive threshold inquiries into aggrievement while at the same time preserving the multi-district panel's discretion to refuse to honor requests for transfer by frivolous petitioners by writing that requirement into the statute as a strict "nonaggrievement" rule, rather than by listing comparative aggrievement as a criterion. Congress could probably accomplish this by providing that the multi-district panel refuse even to consider petitions that were facially inadequate to establish aggrievement with the agency's decision. This would amount simply to a statutory adoption of the rule that has already evolved in the appellate courts under section 2112(a). Even this relatively limited inquiry, however, will require a threshold scrutiny of the petitions, the agency decision, and perhaps the agency record. It could likewise involve briefs and perhaps oral argument. Because inventive counsel can usually find some substantial point on which to disagree with an agency decision, this suggested nonaggrievement rule would probably be successfully invoked only rarely. In the final analysis its benefits may not justify its costs.

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[303] 570 F.2d 965 (D.C. Cir. 1977).

(iv) Regional Nature of the Problem

This Article has already examined proposals that cases be automatically transferred to the circuit containing the "most affected region." [304] Other proposals have stopped short of making "regionality" the only criterion for transfer, but have listed it as one of several criteria.[305] Although the advantages and disadvantages of considering regionality as a threshold matter are attenuated when it is only one of many criteria, the considerations are the same and will not be recapitulated here, except to point out that consideration of this criterion will involve still further time and expense for the parties and the multi-district panel.

(v) Convenience of the Parties

As previously discussed, in most appeals from nationally applicable administrative action, the convenience of the parties is not a relevant consideration.[306] Nevertheless, one can imagine cases, such as between a large employer and a small union or a large union and a small employer, in which convenience might play a role. Listing "convenience of the parties" as a criterion would preserve the multi-district panel's option to transfer in the relatively rare cases in which the inconvenience to one of the parties outweighs the other criteria.

(vi) Convenience of the Courts

The fact that lawyers sometimes consult the status of the dockets of the courts where venue is proper indicates that the desire for rapid resolution of a controversy can outweigh any perceived advantage attributable to a court's reputation or general outlook.[307] The need for expeditious resolution of cases is a relevant consideration for the courts as well. Although no court has ever explicitly relied upon the status of the docket of the potential transferee courts as a reason for transfer,[308] "sound judicial administration" has been suggested as a possible criterion for transfer.[309] The multi-district panel would be in a good position to apply this criterion, because it could objectively assess the respective backlogs of the relevant courts. No searching inquiry of the administrative record would be necessary.

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[304] *See* notes 269-77 *supra* & accompanying text.

[305] Justice Department Proposal, *supra* note 278, at 3; Ross Proposal 1, *supra* note 278.

[306] *See* notes 153-58 *supra* & accompanying text.

[307] Two out of 18 relevant responses to the author's survey letter mentioned this as a criterion of choice. *See* note 42 *supra*.

[308] The court in United Steelworkers v. Marshall, 592 F.2d 693, 697 (3d Cir. 1979), suggested "the relative state of the dockets" as a possible transfer criterion, but did not apply it in that case because all of the convenient courts of appeals had crowded dockets.

The proposed criterion could, however, have the effect of systematically routing most administrative cases in the direction of some courts and away from others. For example, at the end of fiscal 1979, seventy-five cases per judgeship were pending before the Second Circuit, while 123, 116, 167, 148, and 176 cases per judgeship were pending in the District of Columbia, Third, Fourth, Fifth and Ninth Circuits, respectively.[310] The same general disparity holds for fiscal 1978.[311] Application of the "judicial administration" criterion alone in those years would presumably have resulted in a net shift of administrative cases out of the District of Columbia, Third, Fourth, Fifth and Ninth Circuits and into the Second Circuit, even though the Second Circuit received more filings per authorized judgeship than all but the Fourth Circuit in 1979 and all but the Fourth, Fifth, and Ninth Circuits in 1978. One can legitimately question whether a court that keeps up with its docket should be thus penalized.

c. *Automatic Mechanisms*

Rather than giving some body authority to assign cases among the available circuits, Congress could provide an automatic, nondiscretionary mechanism for assigning cases in which multiple petitions have been filed in the same manner that judges are assigned to panels within the circuits.[312] In choosing an automatic mechanism, Congress would need only ensure that its outcomes were not predictable. A simple lottery would probably be the easiest automatic mechanism, or a neutral assigning body, such as the Administrative Office of the United States Courts, could assign cases in some other random fashion.

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[309] Justice Department Proposal, *supra* note 278, at 3; Ross Proposal 1, *supra* note 278.

[310] AO Report, *supra* note 253, at 45, table 3.

[311] *Id.*

[312] *See* Public Serv. Comm'n v. FPC, 472 F.2d 1270, 1272-73 (D.C. Cir. 1972). Lotteries are used for a number of important decisions where more appropriate criteria are elusive, such as the draft for induction into military service, *see* United States v. Kotrlik, 465 F.2d 976 (9th Cir.), *cert. denied,* 409 U.S. 1043 (1972), and the assignment of public housing, *see* Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968). The Federal Communications Commisison has recently instructed its staff to draft a proposed opinion for assigning by lottery a broadcast license between two licensees that are otherwise "equally qualified." *See Broadcasting,* June 9, 1980, at 30, col. 1.

An automatic mechanism would avoid costly courthouse races, eliminate the need for costly threshold discretionary transfer litigation,[313] and satisfy most conceptions of fairness. No party would have any particular advantage, because the choice would be utterly impartial.[314] The starting-pistol problems of section 2112(a) practice would similarly disappear, because all parties would have until the end of a predetermined period to file petitions for review. This should also encourage parties to file thorough petitions for review rather than the prefabricated skeletal outlines that are typical in races to the courthouse.[315] Although the public might be unfavorably impressed by a system which necessitates a lottery or random schedule to allocate cases among presumably neutral forums, the automatic mechanism would virtually eliminate section 2112(a)'s potential for drawing sustained public ridicule. At the same time an automatic mechanism would preserve judicial comity, because the mechanism would avoid any possibility that two courts would be required to decide the same question in the same case. Finally, an automatic mechanism would preserve the percolation and signaling benefits of forum shopping.

Like all forum-allocating mechanisms, the automatic mechanism has its disadvantages, including its failure to encourage uniform application of agency-administered laws and its propensity to perpetuate business uncertainty. The agency and affected businesses can similarly never know in advance how deferential the reviewing court is likely to be toward the agency's factual findings and policy-dominated inferences. To a large extent, however, these disadvantages are an inevitable trade-off that must be suffered in a system that merely controls rather than eliminates forum shopping.

The "pure" automatic mechanism proposal is likely to prove unattractive to many lawyers because of its inherent inflexibility. In order to ensure a properly functioning "pure" automatic mechanism Congress would have to take away from the courts the power to transfer a case once the mechanism had assigned the case to that court. Although it is difficult to imagine a case in which this inflexibility could prove to be inefficient or unfair, the mechanism makes no allowance for such cases. If some flexibility is desired, Congress could retain the flexibility of the existing system —while eliminating most of its unsavory aspects—by allowing the court to which a case is originally assigned to transfer to any other court "in the interest of justice for the convenience of the parties." This proposal would merely eliminate the race; forum shopping could still occur at the discretionary transfer stage.

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[313] *Cf.* Navarro Sav. Ass'n v. Lee, 100 S. Ct. 1779, 1783 n.13 (1980) (arguing that it is more important to have a rule that avoids threshold litigation than it is to have a less arbitrary procedure).

[314] *See* G. Calabresi & P. Bobbitt, Tragic Choices 41-44 (1977); Fels, *supra* note 85, at 50-51.

[315] *See* text accompanying note 7 *supra.*

The obvious disadvantage of this "hybrid" automatic/discretionary model is its propensity to encourage wasteful threshold litigation over discretionary transfer. The previous analysis of the courts' experience in implementing section 2112(a)'s discretionary transfer provision indicates that the transfer criteria rarely point to a single court in a given case. Yet as long as the courts remain relatively generous in granting motions to transfer, the parties to administrative appeals will have an incentive to litigate that question, however inefficient that process might be from an overall societal perspective. Congress might well decide that the costs of this round of threshold litigation outweigh any capacity it might have for preserving fairness in those rare cases in which justice and convenience clearly point to a single court.[316]

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[316] Even if Congress adopted the "pure" automatic assignment mechanism, it might desire to retain sufficient flexibility to deal with the "same order" problem. *See* notes 128-49 *supra* & accompanying text. If all petitions from a given order are determined by an automatic mechanism, then there would appear to be no discretion to allow a single court to decide questions involving simultaneous or successive orders that are in fact the "same order." This defect could be eliminated by giving some body jurisdiction to order consolidation under the "same or interrelated proceedings" rule. *See* text accompanying notes 184-88 *supra*. The ideal body to make this determination is the agency, because it is familiar with its procedures and with the details of the proceedings from which appeals are taken. The Administrative Office of the United States Courts could be required to determine intercircuit petitions by an automatic mechanism except in cases in which the agency certified to the Administrative Office that several orders simultaneously issued were in fact the "same order," in which case the Administrative Office would consolidate all of the petitions and send them to a single circuit. For successive orders, the Administrative Office could be instructed to transfer to the court in which the agency determined that the "same order" is being decided.

Because this suggestion for resolving the "same order" problem appears to allow the agency to engage in forum shopping, *see* text following note 248 *supra*, it may not be politically feasible to enact a statute that provides for consolidation of cases involving the same order by any body of lesser status than a court. The proposal might therefore be modified to require the court receiving the second of two allegedly successive orders to transfer to the court currently hearing the first such order under the stringent "same or interrelated proceedings" rule. *See* notes 184-88 *supra* & accompanying text. A stringent rule would be required to prevent undue threshold litigation over whether two successive orders were in fact the "same order." In no case should transfer be allowed when the first court has already decided the first case, because such transfer would of necessity recognize a theory of specialized tribunals that Congress, in adopting the automatic mechanism, must have rejected. Finally, the Administrative Office could consolidate all

Another problem that proposals for an automatic mechanism must address is the timing of the mechanism and the related question of the issuance of stays of administrative action pending review on the merits.[317] Congress could, of course, essentially eliminate the stay problem by mandating that the Administrative Office choose a forum for the merits within twenty-four hours of the filing of the first petition for review. Because stays are rarely necessary within a day after the agency action, this would in effect assign the stay decision to the court that hears the merits.[318] For the extremely rare case in which a stay is necessary within twenty-four hours any court of appeals in which a petition was filed could retain jurisdiction to issue twenty-four hour stays pending assignment of the case.

The difficulty with the twenty-four hour assignment is the fact that the case could be assigned before all potential litigants would normally be aware of the fact that the agency had acted. To avoid missing the deadline parties would still have to employ paralegals to stalk the Federal Register Office,[319] and lawyers would still be required to file hastily drafted petitions as rapidly as possible. There would thus be a race, but it would be more in the nature of a qualifying heat.

Congress could alternatively provide sufficient time (approximately ten days) for all potential litigants to receive notice of the agency's action before the case would be assigned to a particular circuit. This proposal, however, reintroduces the requirement that some body be vested with authority to issue emergency stays.[320]

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appeals from simultaneous orders and assign them to a single court which would then be required to refer back to that Office for reassignment those orders that were not, according to the court, the "same order." Again, the courts should be encouraged to be niggardly in referring matters back to the Administrative Office so as to discourage threshold litigation.

In the final analysis, the relatively rare cases in which the "same order" question arises may not warrant this much intrusion into the automatic assignment process.

[317] *See* notes 201-04 *supra* & accompanying text.

[318] All parties that filed timely petitions would, of course, be allowed to participate in the appeal. The 24-hour cut-off would merely limit the possible forums to those in which petitions had been filed within that time limit.

[319] *See* text accompanying note 104 *supra*.

[320] This alternative would also hinder the not atypical practice of ordering expedited briefing schedules for the merits of the case after stays have been issued, because the court issuing the stay would not necessarily be the court deciding the merits. However, the court deciding the merits could just as easily order an expedited briefing schedule. The eight or nine days lost awaiting assignment of the case should not seriously interfere with an expeditious resolution of the merits. In any event, if 10 days are needed to give notice to all potential litigants, a briefing schedule that penalized those parties that did not petition for review within that time period would seem fundamentally unfair.

If such authority were granted to the court in which the party seeking the stay filed its petition, a race to the stay-issuing court, with all its attendant disadvantages, would be the likely result.

This residual race could be eliminated in one of two ways. The administrative agency could state that its order did not become effective until after the court of review has been assigned.[321] This would eliminate entirely the rationale for the race. Alternatively, Congress could vest jurisdiction for issuing temporary stays in the Temporary Emergency Court of Appeals,[322] and mandate that any stays thereby granted automatically dissolve within a few days after the circuit of review has been assigned. Although utilizing the Temporary Emergency Court of Appeals in this manner may increase litigant and judicial costs by requiring the litigation of two temporary stays, there would still be marked cost savings overall. Not only is it unlikely that the fight for and against the second stay would require much extra effort,[323] but the single most costly component of the struggle—the race and its attendant litigation—would be eliminated.

Finally, the automatic system does not preclude the possibility of forum shopping to avoid a particular circuit. This problem seems ultimately unsolvable. In the energy area in particular, attorneys representing producers appear to be more concerned with avoiding the District of Columbia Circuit than with locating their appeals in any one of the other circuits.[324] A large multi-state corporation could under many venue statutes substantially increase its chances of avoiding a particular court by filing petitions in all of the other circuits. In any given case the probability of the case being heard in the circuit that it sought to avoid would be only one-in-eleven. This might be perceived as an unfair advantage to the large corporation that can file petitions in many circuits. Congress could reduce the impact of this ploy somewhat by providing that a single petitioner could file only one petition for review, but this rule could easily be circumvented in the typical rulemaking proceeding in which numerous parties are lined up on either side of a given issue.

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[321] For instance, the recently promulgated EPA race regulations state that an order is not "promulgated" until two weeks after its publication in the *Federal Register*. *See Final EPA Race Regulations, supra* note 17, at 26,046.

[322] *See generally* 17 WRIGHT & MILLER, *supra* note 4, at § 4105; Nathanson, *supra* note 250, at 1009-12.

[323] *See* note 320 *supra*.

[324] Confidential communications to the author. *See* note 42 *supra*.

IV. CONCLUSION

The author readily admits that the proposal espoused here an automatic mechanism for the assignment of agency appeals, will be resisted despite its apparent fairness and simplicity. The idea of such a mechanism runs directly against the lawyer's deeply ingrained weltanschauung, the notion that every question has a correct answer that can best be reached through adversial procedures. The burden in this case, however, should be upon those who, perhaps self-servingly, argue that large amounts of society's limited resources should be devoted to the essentially trivial question of which of two co-equal courts shall hear a particular appeal. While the automatic mechanism in some rare cases may work a hardship upon one who cannot afford to send a lawyer to a distant appellate court, that relatively minor disadvantage is more than offset by the vast amount of legal energy that can be conserved by the simple roll of a die.

REPORT IN SUPPORT OF RECOMMENDATION 80-6

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Jawboning Administrative Agencies: Ex Parte Contacts by the White House*

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Considerable attention has recently focused on the proper role of the President in the coordination of agency policymaking. In this period of staggering inflation, conflicts have arisen between the White House, struggling to implement a uniform policy of regulatory cost cutting, and the agencies, whose strong views about their individual missions foster resistance to budget cuts. These conflicts raise questions about the scope of the President's power to affect administrative outcomes and his ability to intervene behind the scenes during the regulatory process.

The decision arena usually pits White House advisors, whose concern is principally with the economy, against agency officials whose health, safety, and environmental rules inevitably contribute to the inflationary spiral. When these protagonists cannot reach compromises, the President may umpire the event. This intervention is a variation on the long-standing practice of presidential "jawboning."[1] In its current form, however, the focus is not on the inflationary practices of private industries, such as steel, but on the regulatory costs of public entities, such as the Environmental Protection Agency (EPA). In both situations, the President may have the power to act directly, but he prefers for political reasons to cajole, persuade, or arbitrate.

The debate about the appropriateness of this assertion of presidential power inevitably engages the legislative and judicial branches. Congress is concerned with which of the three branches will have primary oversight of administrative policy. Recently, in an effort to regain control of administrative decisionmaking, Congress has adopted the techniques of the legislative veto, sunset laws, and more extensive budgetary review. It is currently debating proposed legislation that would intensify these controls as well as formally expand the President's control over agency policymaking.[2]

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The death of Harold Leventhal was a great shock to all of us in the administrative law field. He was one of that small number of thoughtful judges who dealt with the subject matter in a fresh and challenging way, regularly producing opinions worthy of casebook and treatise immortality. He was also a good friend and an amiable interrogator who relished lively discussion and was never reluctant to seize or reject controversial positions. My guess is that the topic of this Article would in time have produced from him an opinion of characteristic insight and incisiveness. (A hint of how he might have treated this issue appears in his remarks before the Environmental Law Institute Colloquium, see note 109 infra.) It is hard to believe that we will not again have the benefit of the Leventhal view.

[1] "Jawboning" became part of the political lexicon when President Kennedy sought to restrain prices and wages in the steel industry. William Safire notes that President Carter prefers the phrase "moral suasion" to send the same message. See W. Safire, Safire's Political Dictionary 346 (1978). Recently, however, the press characterized President Carter's attack on Mobil Oil Corporation for its failure to make refunds as a "public jawboning campaign." See New Orleans Times-Picayune, Mar. 29, 1980, at 11.

For the judiciary, the question is whether the President and his advisors should be subject to newly unveiled rules on ex parte contacts in informal decisionmaking that have formerly been applied only to private interests. Forceful claims have been made that the agencies should be free of "interference" from all outsiders, including those who work in the executive office buildings.[3] The White House, quite naturally, regards the label "outsider" as a contradiction of its institutional responsibilities, which, by their nature, must be exercised in private.

It would not be surprising if Congress soon brings these matters to a legislative conclusion. It is equally likely that the judicial review questions will be addressed by the courts. It is thus a propitious time to study and evaluate the institutional and constitutional issues that surround the current debate. This Article discusses the constitutional sources of presidential power to control agency policymaking. It also suggests the devices available to Congress to limit White House intervention. The core of the Article analyzes judicial decisions imposing restrictions on ex parte contacts in formal rulemaking and adjudication, and concludes that these restrictions should not automatically be extended to private involvement in informal rulemaking, let alone presidential involvement. Finally, the Article evaluates several proposals for regulating White House contacts and offers its own recommendations.

I. OVERVIEW

A. *The Decisionmaking Context*

The Carter Administration has had confrontations with agency policymakers over health, safety, and environmental rules proposed by executive agencies that White House economic advisors consider more costly than necessary to achieve what they view as a tolerable level of benefits. This White House intervention in the agency decision process has produced dismay among the participants and, in some instances, consternation among the regulators as well. The three rules that have attracted the most attention involved the regulation of cotton dust, ozone levels, and strip mining. The events surrounding the promulgation of these rules provide an illustrative factual predicate for the larger institutional concerns they raise.

1. *Cotton Dust.* In 1978, the Occupational Health and Safety Administration (OSHA) of the Department of Labor promulgated regulations establishing a

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[2] See text accompanying notes 211-29 infra.

[3] See Memorandum by Robert Rauch, Environmental Defense Fund, 1 (Sept. 5, 1978).

permanent health standard limiting exposure to cotton dust.[4] After extensive public comments and the creation of an informal rulemaking record in excess of 100,000 pages,[5] the agency decided that it was "technically and economically feasible" for the industry to reduce exposure to cotton dust by set limits within a four-year implementation period.

During the rulemaking proceeding, but after the close of the public comment period, Charles Schultze, the head of the Council of Economic Advisors (CEA), speaking with the President's concurrence, expressed to Labor Secretary Ray Marshall the Administration's concerns about the inflationary impact of the standards.[6] Marshall objected to this interference,[7] but a compromise was later reached when the President brought both principals together in the Oval Office.[8] When the final rule was announced on June 19, 1978, Secretary Marshall and Chairman Schultze held a joint press conference, where Secretary Marshall attested to the Administration's concern for promulgating regulations that are effective without being inflationary.[9] Although the AFL-CIO challenged the standard in court, it confounded expectations by failing to press objections to the President's role before the District of Columbia Circuit.[10]

2. *Ozone*. The EPA has also come in for its share of external pressure. Under the Clean Air Act, the Agency is required to set national air quality standards for major cities. After consultations with Alfred Kahn of the Council of Wage and Price Stability, Charles Schultze, and White House science advisor Frank Press, the Administrator of the EPA, Douglas Costle, announced a reduction in the standard for ozone levels.[11] Immediately following this action, Costle received directions from the President's economic advisors concerning the issuance of regulations under the Clean Water Act. In a strong clash of views, Costle ultimately wrote Kahn a letter stating why the EPA's toxic effluent control program was proceeding properly.[12] The White House press secretary had perhaps precipitated that exchange by inviting EPA officials who were allegedly

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[4] Standard for Occupational Exposure to Cotton Dust, 43 Fed. Reg. 27,350-99, as amended, id. at 28,473-74, 35,032-35, 56,893-94 (1978) (codified in 29 C.F.R. § 1910.1043 (1979)).

[5] The agency provided 90 days for written comments and held informal hearings in three cities for 14 days. Comments were submitted by 263 persons, and 109 participated in the hearings. See AFL-CIO v. Marshall, 617 F.2d 636, 647 (D.C. Cir. 1979).

[6] See DeMuth, The White House Review Programs, 4 Regulation 13, 19 (Jan./Feb. 1980).

[7] On May 24, 1978, Secretary Marshall wrote to the President objecting to interference by the CEA and the Council on Wage and Price Stability, 6 Occupational Safety & Health Rep. (BNA) 54 (1978).

[8] On June 7, 1978, the Secretary and Eula Bingham met with President Carter, U.S. Dep't of Labor, News Release, June 8, 1978. See Clark, When the President Tries to Regulate, Nat'l L.J., Dec. 16, 1978, at 2029; U.S. Dep't of Labor, News Release, June 19, 1978, at 2.

[9] Id.

[10] The court of appeals substantially upheld the rule against a variety of industry challenges. AFL-CIO v. Marshall, 617 F.2d 636 (D.C. Cir. 1979).

[11] Originally set at .08 parts per million, the final standard announced on Jan. 20, 1979, was .12 parts per million. The practical effect of the rule was to judge as "clean" the smog levels of 10 to 20 cities that would have had to reduce pollution under the old standard. Wash. Post, Jan 21, 1979, at A1.

[12] Letter from Douglas Costle to Alfred Kahn, Feb. 23, 1979, reprinted in Legal Times of Wash., Mar. 5, 1979, at 23-24.

dissatisfied with Administration involvement to resign.[13] At this point strong criticism about White House interference was heard from Senator Edmund Muskie.[14] Congress became involved in other ways, too, characteristically speaking with several voices. According to reports, Costle was subjected to "hard-ball arm-twisting" from coal-state senators to relax the EPA air pollution rules for coal power.[15] This suggests that presidential interference in agency policymaking is not the only issue; Congress also finds intervention to be a necessary technique, either directly or by use of the White House as a surrogate intervenor. The ozone regulations are now being appealed, and the issue of White House staff intervention is before the District of Columbia Circuit.[16]

3. *Strip Mining*. In another controversial case, the Secretary of the Interior, through the Office of Surface Mining Reclamation and Enforcement (OSM), promulgated permanent rules regulating surface mining.[17] The OSM had initially proposed stringent rules after a notice and comment rulemaking proceeding. During the comment period, the Council of Economic Advisors submitted comments concerning the inflationary impact of the rules.[18] Thereafter, the Council continued to meet with representatives of the Department before the rules were announced by the Secretary. During this postcomment period the OSM announced that it was reopening the administrative record to permit inclusion of all oral and written comments between the Council and outside parties.[19] The purpose of the notice was to assure the public that the Council would comply with the strictures against ex parte contacts that the agency imposed on itself and would not become a "conduit" for private comments. Public interest participants sought to enjoin this process, but relief was denied in *Natural Resources Defense Council v. Schultze*.[20]

After the closed meetings between the Council and the Department and the issuance of the regulations, the public interest plaintiffs sought to discover what discussions had taken place and what documents had been introduced.[21] The court denied the motion for discovery, but it did order the Council to produce any documents obtained from outsiders that had not been included in the record.[22] After the final rules were promulgated,[23] plaintiffs sought judicial review in the district court on the ground that the Council's involvement tainted the postcomment decision process, rendering the resulting rule arbitrary and capricious. The plaintiffs did not make the bold assertion that any involvement by the CEA in the postcomment decision process was forbidden, but only that the Council was disqualified from participating in this particular case because it had not properly purged the influence of postcomment contacts with private parties.[24]

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[13] See Wash. Post, Feb. 23, 1979, at A14. The headline read: "If you don't like it, get out, White House tells EPA staff."

[14] Wash. Post, Feb. 27, 1979, at A2.

[15] Wash. Post, May 5, 1979, at A1. Among the tactics employed was a letter from coal-state senators to President Carter requesting his intervention on behalf of the coal industry.

[16] American Petroleum Inst. v. Costle, No. 79-1104 (D.C. Cir., filed Nov. 9, 1979). See also American Petroleum Inst. v. Costle, 609 F.2d 20 (D.C. Cir. 1979) (per curiam) (related case).

[17] 43 Fed. Reg. 29,012 (1978).

[18] See Department of Justice Memorandum on Legality of "Ex Parte" Contacts, Jan. 19, 1979, reprinted in Legal Times of Wash., Jan. 29, 1979, at 32-33.

[19] 44 Fed. Reg. 1355 (1979).

[20] 12 Envir. Rep. (BNA) 1737 (D.D.C. 1979). The injunction was denied for lack of a showing of irreparable harm.

[21] In re Permanent Surface Mining Regulation Litigation, 13 Envir. Rep. (BNA) 1586 (D.D.C. 1979).

[22] The purpose of the limited discovery was to "ensure that the record is complete" for judicial review. In re Permanent Surface Mining Regulation Litigation, 13 Envir. Rep. (BNA) 1586, 1597 (D.D.C. 1979).

[23] 44 Fed. Reg. 14,902 (1979) (final version codified at 30 C.F.R. ch. 7 (1979)).

These three situations offer different levels of White House involvement. The top level—direct involvement by the President with cabinet-level officers—was seen in the cotton dust rulemaking. In that proceeding and in the ozone rulemaking, there was also a second level of involvement, between top White House policy advisors and top agency officials. In the strip mining proceedings, the principal contacts were between the aides and assistants of each of the officials involved. This level of contacts, although occurring most frequently, arguably bears a heavier burden of justification since it is more removed from direct presidential control. In order to assess the proper scope of presidential involvement in agency policymaking, it is important first to emphasize why the President does intervene, and second, to record the valid public concerns such activity produces.

B. *The Accountability Problem*

President Carter was hardly embarking on a new undertaking as he tried to make the administrative process more responsive to the executive branch, which, in turn, is accountable to the electorate. What stands out is the notable lack of success of previous administrations in controlling policymaking by administrative agencies. By their nature and organization independent agencies have long resisted policy control by the President.[25] In recent years even the executive agencies, which have reason to be instinctively loyal to the President, have been subjected to executive accountability efforts.[26] The task facing President Carter was more awesome than in the past, however. In the 1970's, when Congress created a maze of new environmental, health, and safety standards, placing complicated responsibilities upon new and existing agencies, it created presidential accountability problems of an order of magnitude different from those faced in earlier times.[27]

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[24] The more extreme position—that all White House involvement with the agency is forbidden after the comment period—has been advocated by the Environmental Defense Fund, see Rauch Memorandum, supra note 3, at 39-40, and will undoubtedly be argued to the courts in some future rulemaking.

[25] During the Roosevelt Administration the independent agencies were labelled a "headless fourth branch of government" by the Brownlow Committee. The solution suggested was to remove "nonjudicial" functions from the independent agencies and place them under executive agency control. A similar kind of reform was advocated by the Ash Council during the Nixon Administration. The President's Advisory Council on Executive Organization, A New Regulatory Framework 13-17 (1971). The solution there recommended was replacing collegial commissions with single administrators, who presumably would be more accountable. See generally J. Freedman, Crisis and Legitimacy—The Administrative Process and American Government 8-9 (1978).

The problem of the accountability of collegial bodies arises in regard not only to their relationship to the executive branch, but also to their ability to discharge their statutory missions. This aspect of the problem was emphasized recently in connection with the Nuclear Regulatory Commission's failure to respond effectively to the Three Mile Island accident. Both the Kemeny Commission, appointed by President Carter, and the Rogovin investigation, sponsored by the NRC, recommended a reorganization from a commission format to a single chief executive in order to achieve effective management. See N.Y. Times, Jan. 25, 1980, at A13. See also note 116 infra.

[26] Efforts include the Nixon Administration's controversial "quality of life" review, under which the executive Office of Management and Budget (OMB) passed on environmental regulations.

The Carter Administration attempted to coordinate agency policymaking in a variety of ways. The President issued Executive Order 12,044,[28] requiring each agency to establish a semiannual agenda of significant regulations under development; to expand upon traditional procedural requirements for rulemaking;[29] and to identify and carefully evaluate the need for "significant regulations," including less costly alternative approaches.[30] "Major rules," defined as those having an impact upon the economy of $100 million or more, are to be subjected to a "regulatory analysis" that contemplates a careful study of alternatives and their relative cost effectiveness. The latter requirement is reminiscent of the Ford Administration's "inflation impact statement,"[31] but it does not reflect a total commitment to cost-benefit analysis.

The Carter Administration also established an interagency organization called the Regulatory Council.[32] The role of the Council is twofold. Its first task is to collect agency information about major pending and proposed rules and publish it semiannually in the Regulatory Calendar.[33] Its second, more substan-

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and the "inflation impact statement" required of executive agencies during the Ford presidency. See J. Quarles, Cleaning Up America 117-42 (1976); Exec. Order No. 11,821, 3 C.F.R. § 203 (1974), reprinted in 12 U.S.C. § 1904 (1976).

[27] To take but one example, the Council on Environmental Quality estimates that the cost of complying with environmental regulations will grow from $19 billion to $52 billion (in 1977 dollars) by 1986. See C. Schultze, Testimony on H.R. 3263 before the House Judiciary Committee, at 4 (Nov. 7, 1979).

[28] 43 Fed. Reg. 12,661 (1978), codified in 3 C.F.R. 152 (1979). The order was first published in draft form for public comment. 42 Fed. Reg. 59,740 (1977). During this period the President asked whether the order should be extended to the independent agencies. After receiving adverse comments, the President ultimately exempted independent agencies from mandatory compliance with the order to avoid a "confrontation with Congress." 43 Fed. Reg. 12,670 (1978). At least one respected scholar has indicated that the President has the constitutional power to extend the procedural requirements of the order to independent agencies. See Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 498-99 (1979).

[29] The order enhances public participation in the rulemaking process by requiring advance notice of proposed rules, a 60-day comment period, and open conferences and public hearings.

[30] Significant regulations are to be determined by their impact upon those regulated and by their "direct and indirect effects . . . including the effect upon competition." Exec. Order No. 12,044, § 2(e), codified in 3 C.F.R. 153 (1979).

[31] See note 26 supra.

[32] The Regulatory Council consists of the heads of all executive departments and agencies and those independent agency heads who desire to participate on a voluntary basis.

[33] The second Regulatory Calendar, issued on Nov. 28, 1979, described 130 rules. It is a measure of how "unaccountable" regulatory policymaking had been that before this calendar was published no one was able to tell the President how many rules were promulgated annually. Conversation with Richard Neustadt, White House staff member (November 1979). It is remarkable that the agencies themselves never thought it in their interest to collect such information.

The Regulatory Council now estimates that the number of rules promulgated annually is in excess of 7,000. R. Neustadt, Regulatory Reform—The President's Program 1 (1979). This report estimates that there are about 2,000 rules each year with significant impact, as defined in note 30 supra, and more than 100 with major economic effects, see text accompanying note 31 supra.

tive, task is to serve as a prescreening body for proposed rules, allowing agencies to coordinate rulemaking to avoid duplication of effort or contradictions of policy.[34] The Council is currently studying regulations with multiple agency impact that affect the coal, steel, automobile, and housing/home financing industries.[35]

Another rulemaking review organization, established by the Administration in 1977, is the Regulatory Analysis Review Group (RARG), composed of representatives from all economic and regulatory agencies and chaired by the Council of Economic Advisors. The function of RARG is to scrutinize the regulatory analyses of fifteen to twenty proposed major rules each year and file a public report in the relevant rulemaking record during the comment period.

Between the prerulemaking functions of the Regulatory Council and the analysis and commentary function of RARG, the Carter Administration created coordinating bodies that achieve results similar to those attained by the OMB "quality of life" review used in the Nixon and Ford Administrations, but without the same political costs.[36] The Carter Administration solutions are dominated by the agencies rather than OMB, and the critical analyses are offered for public comment. Thus, much of the concern over secret White House policymaking is reduced. But even with these policy coordination techniques, the present Administration still believes that continuing off-the-record White House involvement in the rulemaking process is crucial.[37]

C. *The Public Concerns*

No one quarrels with the need of the President and his advisors to coordinate policymaking by administrative agencies. Rising inflation has made this need all the more pressing, because the cost of government social regulations enters directly into the wage- and price-setting mechanisms of the economy. Coordination efforts that increase the efficiency of these regulations will conserve resources for other uses and reduce inflationary pressures.[38] Viewed from this perspective, participation by the President directly or through expert economic advisors promotes regulatory efficiency.[39]

Nevertheless, there are valid public concerns about how and to what extent the White House should shape regulatory policy. Highly charged White House intervention poses a danger of frustrating the will of Congress as expressed in legislation establishing an agency and defining its mission.[40] The danger is not that express mandates precluding or compelling consideration of economic efficiency will be compromised.[41] The problem is more subtle. White House efficiency experts may have an unwelcome effect upon administrators who implement legislation that has a primary focus on social benefit but is silent about balancing other economic interests. To what extent does Congress have a right to expect agency decisionmakers to be "singleminded" in their fidelity to the announced objectives of the legislative scheme? Will responsible bureaucrats retain their regulatory independence when they receive vigorous pressure from White House advisors with a laudable, but not congressionally emphasized, mission?

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[34] One example was the successful coordination among five agencies that regulate carcinogens resulting in the uniform cancer regulatory policy announced in September 1979.

[35] See R. Neustadt, supra note 33, at 4.

[36] "Quality of life" review by OMB during the Nixon administration was blamed for undermining many environmental regulations. See Office of Management and Budget Plans Critical Part in Environmental Policymaking, Faces Little External Review, 7 Envir. Rep. (BNA) 693 (1976).

[37] R. Neustadt, supra note 33, at 15.

[38] See C. Schultze, Testimony, supra note 27, at 5-6.

[39] The CEA's economists are acknowledged to be among the most capable in government service. Thus, a case for White House oversight can be made simply in terms of effective use of talent.

Related to this concern is the fear that strong policymaking from within the White House will reduce incentives for regulators to act responsibly, which will in turn ultimately reduce the quality of administrative appointments.[42] Moreover, some believe that intervention by White House policymakers may not produce better policy, simply because White House staff members are not necessarily better policymakers than agency personnel.[43]

Finally, separation of powers concerns, as they relate to the integrity of government, are implicated when White House actions reflect the interests of private industry in emphasizing a cost-minimization regulatory policy. Powerful private lobbies, increasingly frustrated in obtaining preferential access to administrators, can be expected to use White House political advisors to achieve equivalent clout.[44] The expressed fear is that government regulation will be co-opted by private groups through the intercession of the White House.

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[40] These concerns were expressed vigorously by Senator Muskie during the White House negotiations with EPA over the ozone regulations. See note 14 and accompanying text supra.

[41] If Congress can make its intent absolutely clear, the agencies and the White House are bound to respect it. For example, the Delaney clause, 21 U.S.C. § 348(c)(3)(A) (1976), establishes a per se rule prohibiting all food additives that induce cancer when ingested by man or animal. Thus, even a trace of cancer in a laboratory animal that has been fed saccharin has triggered the ban. See generally P. Verkuil & D. Boies, Public Control of Business 725-27 (1977); Comment, Implementing the Anticancer Clauses of the Food, Drug and Cosmetic Act, 44 U. Chi. L. Rev. 817 (1977). The Endangered Species Act of 1973, 16 U.S.C. § 1536 (1976), is another example. The Supreme Court interpreted it as placing an "incalculable value" upon endangered species, and thus did the snaildarter halt the Tellico dam. See Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978). Another telling example of the effect of congressional specificity is the Clean Air Act, 42 U.S.C. § 1857 (1976), which contains no requirement of economic or technological feasibility and therefore precludes the judicial imposition of cost-benefit analysis. See Union Elec. Co. v. EPA, 427 U.S. 246 (1976).

Similarly, if Congress establishes a statutory scheme that mandates consideration of economic efficiency, neither the White House nor the implementing agency is free to ignore the relevance of cost-benefit calculations. An example is the recent struggle by the courts with the cost-benefit requirements for regulating toxic substances imposed in the Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (1976). See American Petroleum Inst. v. Occupational Safety & Health Admin., 581 F.2d 493 (5th Cir. 1978), aff'd sub nom. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 48 U.S.L.W. 5022 (1980).

[42] For these reasons, Judge Friendly, in his influential 1962 Holmes Lecture, reacted negatively to a suggestion that the White House issue "policy guides" to the FCC. H. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 153 (1962). Judge Friendly was commenting upon a proposal made in Redford, The President and the Regulatory Commissions (Nov. 17, 1960) (unprinted report on file at the Bureau of the Budget). See generally Byse, Comments on a Structural Reform Proposal: Presidential Directives to Independent Agencies, 29 Ad. L. Rev. 157, 158-60 (1977).

[43] H. Friendly, supra note 42, at 153-54

A classic instance of this tendency occurred during the Nixon Administration in the initial days of the EPA. John Quarles, the first chief legal officer of EPA, was summoned by White House assistant Peter Flanigan to explain a court action EPA was bringing against polluters in Galveston Bay.[45] Flanigan first instructed Quarles to distribute to EPA officials a statement by President Nixon that American industry not be made "the whipping boy" of environmentalists.[46] Flanigan then read a letter to the President from one of the targets of EPA's case, complaining angrily about the adverse effect the EPA order would have on his plant's operation. Before long the White House had involved itself directly in the EPA's litigation strategy. Quite understandably, this precipitated a strong congressional reaction against both the White House and the EPA.[47]

Institutional concerns of the judiciary are also implicated by White House intervention. What should the role of the courts be when reviewing administrative rulemaking that has been subjected to White House oversight? Agency policymaking usually occurs after informal rulemaking proceedings, which are subject to procedural requirements and judicial review.[48] Reviewing courts are increasingly expressing the view that they can fulfill their institutional role only if they know the basis for the agency decision.[49] This desideratum has led the courts on review to peruse a "record" of information, comments, and contacts that occurred during the rulemaking process.[50] By extension of this reasoning, White House contacts and comments may be subject to "record" treatment as well.

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[44] William T. Coleman, a former Secretary of Transportation, has recently characterized this danger in strong language:

> Even more 'ominous' is the so-called White House political advisor, whose role is never clearly defined in public but whose bias may simply be the position that will most ensure reelection of the President. His advice will be tailored to achieve the support of a particular constituency at a time when politically desirable or to enhance the President's appeal in a region of the country. Such an advisor—immune from public scrutiny and congressional accountability, free from the constraints of agency decision-making processes, and removed from the advice of experts in the bureaucracy—is not in a position to make a meaningful balancing choice among competing national goals.

ABA Commission on Law and The Economy, Federal Regulation: Roads to Reform 157 (1979). Mr. Coleman dissented from a recommendation of the ABA Commission that the President have the power, subject to procedural constraints, to override the policy decisions of regulatory agencies. This proposal is discussed at notes 208 & 211-22 and accompanying text infra.

Judge Friendly, despite his original fears, which were similar to those of Mr. Coleman, see note 42 supra, changed his position and supported the recommendation, arguing that "[s]omeone in Government, and in the short run that someone can only be the President, must have power to make the agencies work together rather than push their own special concerns to the point that the country becomes ungovernable." Id. at 163.

[45] The story is well told in J. Quarles, supra note 26, at 60-69. EPA had brought suit in Houston against the ARMCO Steel Company. Id. at 61.

[46] Id. at 63.

[47] In a House oversight hearing Representative Reuss suggested to EPA witness Quarles that Flanigan's involvement in EPA litigation was "akin to a 'fix.' " Id. at 74.

[48] See 5 U.S.C. §§ 553, 706 (1976).

[49] See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1, 33-37 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976). See generally Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38 (1975).

These institutional apprehensions, which arise from the pattern of checks and balances that informs our constitutional system, cannot be lightly dismissed, but they must be viewed against the necessity of coordinated policymaking and accountable officials in an increasingly complex system of government regulation. Each of the public concerns postulates a distrust of government that has a basis in fact but may be excessive as it relates to policy control by the White House. In the co-optation situation, for example, the assumption is that White House advisors are or will become conduits for private viewpoints. If they do, as in the Quarles-Flanigan incident, executive "interference" in ongoing agency adjudication can be ferreted out. But there may be other situations in which White House involvement actually contributes to sound policymaking in agencies where some private interests have already achieved control of decisionmakers. The courts will still need to distinguish the different interests at stake when contacts are not privately inspired but are generated by contacts within government itself. Ultimately the question is whether or not the White House is to be part of the agency decision process. And if it is, what are the limits of appropriate involvement? These questions can be answered only after examining the President's executive power under the Constitution.

II. The Presidential Power to Control Agency Policymaking

Article II of the Constitution admonishes the President to "take Care that the Laws be faithfully executed"[51] and gives him the power to supervise his subordinates by requiring "the Opinion, in writing, of the principal Officer in each of the executive Departments."[52] He is assured of some control over policy through the ability to appoint "Officers of the United States,"[53] a category that includes cabinet officers and related high officials. The important message to be gleaned from these provisions is that the executive power is not shared—it is all placed in the President. The idea of a "plural executive," or a President with a council of state, was considered but rejected by the Constitutional Convention.[54] The Convention chose to risk the potential for tyranny inherent in placing power in one person to gain the advantage of accountability fixed on a single source.[55] Accountability is a crucial aspect of the executive power as expressed in article II.

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[50] It has also come to mean that the procedures of informal rulemaking—notice, comment, and statement of reasons—will be enforced as if they were being applied in an adjudicative context. See Stewart, The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 Iowa L. Rev. 713, 729-33 (1977).

[51] U.S. Const. art. II, § 3.

[52] Id. § 2, cl. 1.

[53] Id. § 2, cl. 2. In Buckley v. Valeo, 424 U.S. 1, 125-26 (1976) the Court concluded that any appointee exercising "significant authority" pursuant to federal law was an "officer of the United States."

[54] See A. Schlesinger, The Imperial Presidency 382-86 (1973).

The general grants of executive power in article II are, however, inadequate to answer the more specific question of the scope of the President's authority over those of his subordinates who make administrative policy. To resolve this question, the inquiry must focus on the President's removal power, a subject not treated explicitly in the Constitution, and on the inherent power to control subordinates implied by the executive responsibilities contained in article II. Finally, consideration must be given to the President's need to control his subordinates in private, through the application of executive privilege.

A. *The Power to Remove*

The President's power to control policy begins with his appointment of those subordinates who formulate policy in the first instance, since the appointment and confirmation process is the best method for achieving policy coordination. Not all appointments work out, however, and thus the power to remove may be equally necessary to achieve desired results. The classic "removal" cases that form the basis for constitutional analysis need only be briefly reviewed here for the light they shed on the President's inherent power to control policymaking by agencies.[56]

In *Myers v. United States*,[57] the Supreme Court held that an attempted congressional limitation upon the President's power to remove an executive official was unconstitutional, thus assuring President Wilson absolute power to remove a postmaster.[58] Finding the power to remove subordinates to be inherent in the executive function,[59] the Court indicated that the principal qualification on this power related to those who exercise "duties of a quasi-judicial character."[60] *Humphrey's Executor v. United States*[61] presented the question whether President Roosevelt could remove an FTC commissioner (a nonexecutive officer) without complying with a statutory for-cause requirement. The Court answered in the negative, again highlighting the quasi-judicial responsibilities of the official involved.[62] *Humphrey's Executor* also modified the broad dicta of *Myers* by conceding congressional control over subordinates in the "independent" agencies.[63] In *Weiner v. United States*,[64] the Court reemphasized the significance of quasi-judicial duties in preventing President Eisenhower from removing without cause a member of the War Claims Commission, even though Congress had not imposed any restrictions on removal.[65]

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[55] As Professor Schlesinger states: "In the case of high crimes and misdemeanors, who, to put it bluntly, was to be impeached?" Id. at 386.

[56] Professor Harold Bruff has recently done an excellent job of analyzing the removal cases. See Bruff, supra note 28, at 475-83. See also The Constitution of the United States of America—Analysis and Interpretation, 82d Cong., 2d Sess. 457-81 (E. Corwin ed. 1953).

[57] 272 U.S. 52 (1926).

[58] Congress had provided by statute that postmasters were to have four-year terms and could be removed by the President only with the Senate's advice and consent. Id. at 107.

[59] Id. at 117.

[60] Id. at 135.

[61] 295 U.S. 602 (1935).

[62] The Court feared that a failure to respect congressional restrictions on the removal of FTC commissioners could lead to similar nonstatutory removals of ICC commissioners and even court of claims judges. Id. at 629.

Under the limits established in these cases, the commissioners of independent agencies, which traditionally engaged in adjudication, are most likely to be secure from presidential removal without cause. This protection, however, is not so clear-cut today, due to the expanding policymaking roles of agencies such as the FTC.[66] If Congress continues to authorize independent agencies to make important policy decisions, it has to affect their traditional independence from executive control. Commissioners of adjudicative agencies who also formulate policy through rulemaking are increasingly placed in the awkward position of having to be neutral in any adjudications that result from the application of this policy. If one is willing to accept the proposition that a commissioner can be "less unbiased" in rulemaking matters than in adjudications,[67] it is not difficult to foresee a revival of the movement to limit independent agencies to an adjudicative role or to replace them with other bodies less likely to be compromised by a duality of roles.[68]

As these agencies devote more resources to promulgating rules, future Presidents may want to control their rulemaking practices while conceding congressional primacy in the area of adjudication.[69] The manner in which Presidents will be able to exercise control may be limited, however. For example, it is doubtful whether *Humphrey's Executor* can be construed to permit removal of FTC commissioners for poor policymaking.[70] So long as Congress has vested policymaking and adjudicative authority in the same personality, it would be difficult to determine whether the President was exercising his removal power because of policymaking failures or because of adjudicative lapses. Moreover, because rulemaking is more akin to legislating than to executing the laws, the case for congressional control over the tenure of commissioners who function both as policymakers and adjudicators remains strong.[71]

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[63] The designation of an agency as "independent" usually flows from the presence of statutory characteristics such as a for-cause removal restriction and a collegial commission-type organization. For a listing of agencies that the Carter administration considers independent, see 44 Fed. Reg. 11,389 (1979).

[64] 357 U.S. 349 (1958).

[65] Id. at 354-56. This holding presumably extends to the statutes governing other independent agencies such as the FCC, the SEC, and the Federal Energy Regulatory Commission, where Congress has not mentioned removal.

[66] When Humphrey was a commissioner, the FTC was a purely adjudicatory agency. Until 1964, the agency took the position that it did not possess substantive rulemaking power. See National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693-94 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). Today, however, the FTC devotes a large share of its resources to making policy through the promulgation of rules. 15 U.S.C. § 57a (1976).

[67] See Association of Nat'l Advertisers, Inc. v. FTC, No. 79-1117 (D.C. Cir. Dec. 27, 1979), cert. denied, 100 S. Ct. 3011 (1980) (reversing the disqualification of FTC chairman Pertschuk in the rulemaking for advertising during children's television shows).

[68] This trend could lead to revived proposals for an administrative court, an idea that has never gained much support from Congress or the bar. See discussion at note 25 supra.

[69] Congress has recently been dealing harshly with the FTC over its rulemaking practices. See generally Gellhorn, The Wages of Zealotry: The FTC Under Siege, 4 Regulation 33 (Jan./Feb. 1980).

[70] Congress granted the FTC substantive rulemaking power in 1975, but it did not amend the removal power. Hence it could be argued that the for-cause limitation was to apply to rulemaking as well as adjudication.

This does not mean that the President's removal power over independent commissioners is nonexistent. In the first place, *Humphrey's Executor* stands virtually alone as a precedent limiting presidential power.[72] Secondly, it should not be overlooked that the President's power to remove for cause is itself a significant tool of executive control whose contours have not been identified, simply because no President has yet tried to remove independent commissioners in this fashion. Undoubtedly, however, the threat to do so remains a potent method of achieving resignations from unwanted commissioners. In addition, it is not clear what kind of hearing and what burden of proof would be required to establish cause in the particular case.[73] Furthermore, one might speculate that Presidents have in the past and will in the future require resignations signed in advance before they appoint people to independent commissions.[74] By this method a President could circumvent any for-cause removal problem that might arise at a later time.

Moreover, some statutes establishing independent agencies authorize the President to appoint the chairman and place no restrictions on his power to remove that person as chairman.[75] This power is limited in that all the President can do is return the particular chairman to the status of commissioner until his or her term expires.[76] Despite this limitation, the power suggests an ability to control agency policy by the use of removal or by the threat of it. This is one of the few techniques available to the President for increasing the accountability of independent agencies that does not brook confrontation with Congress.

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[71] Whatever the constitutional power may suggest, it is unlikely as a political matter that a President would want to challenge the long-held assumption that independent commissioners are secure from removal. Professor Cary considers it politically untenable that Congress would permit the President to make commissions subordinate to executive departments. W. Cary, Politics and the Regulatory Agencies 20 (1967).

[72] In Morgan v. Tennessee Valley Auth., 28 F. Supp. 732, 737 (E.D. Tenn. 1939), aff'd, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941), the district court approved President Roosevelt's removal of a member of the TVA and the Sixth Circuit affirmed. Despite the presence of a statutory removal scheme, and despite the recent decision in *Humphrey's Executor*, the court identified as incidental to the appointment power an executive power to remove that could be circumscribed only by precise and unmistakably clear legislative action. In Lewis v. Carter, 436 F. Supp. 958 (D.D.C. 1977), the district court denied a preliminary injunction sought by an EEOC commissioner against his removal, although it acknowledged that *Humphrey's Executor* might impose some restraints upon removal. Also, it must not be forgotten that both *Humphrey's Executor* and *Wiener* were cases seeking lost salary, rather than reinstatement. See L. Tribe, American Constitutional Law 189 (1978) (the power to reinstate should be available if needed).

[73] There would also have to be substantive tests devised to determine whether the vague standards constituting "cause" for removal—"inefficiency, neglect of duty, or malfeasance in office," to take the FTC example, 15 U.S.C. § 41 (1976)—were met in the particular removal situation.

[74] President Coolidge is reported to have attempted to circumvent for-cause removal restrictions by demanding a signed resignation from an independent commissioner before he received his commission of reappointment. See E. Corwin, The President—Office and Powers 1787-1957, at 95 & n.87 (1957).

[75] This is the case for the older independent agencies, such as the FTC, FCC, SEC, and NLRB. The power to remove chairmen without cause is not universally recognized, however, and thus may not be constitutionally based; other statutes condition the President's removal power by limiting it to removal for cause. See, e.g., the provision governing the Federal Reserve Board, whose chairman is intended to be independent of the President on matters of monetary policy. 12 U.S.C. § 242 (Supp. II 1978). Other statutes fix the chairman's tenure, see, e.g., 15 U.S.C. § 2053 (1976) (Consumer Product Safety Comm'n). Nonetheless, the President can make effective use of his power to remove the chairman when he believes an agency's policy functions are being managed poorly. For example, calling for "fresh leadership," the President recently removed the NRC chairman,

B. *The Power to Control*

The power to control subordinates who make policy is at the core of any presidential effort to achieve accountability. The word "control" has several meanings in this context. In one sense it reflects the process of management control, which demands that the executive speak with one voice and imposes a structure on decisionmaking that includes clearing major policy matters with the White House. For the independent agencies, however, the word is better translated as "cajole," since this is as far as the President can go if he is to retain the support of Congress. "Control" also implies that the President may on occasion actually make decisions himself, even though the decisionmaking responsibility is nominally placed in the hands of subordinates.

In some matters the President has the constitutional responsibility to decide, even though he may act through subordinates. Thus, some cabinet officers are notable for a lack of independence. Certainly this is the case with the Secretary of State,[77] as evidenced by recent events culminating in the resignation of Secretary Cyrus Vance when he disagreed with a major presidential policy decision. And, since the administration of Andrew Jackson,[78] it has been clear that the

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giving that position to another commission member for the duration of the term, at which time the President could designate a new chairman from outside the agency. See White House Press Release, Dec. 7, 1979, at 1.

[76] A commissioner removed as chairman may remain on the commission if his or her term has not expired. Therefore, the President's power to reappoint a new chairman may be restricted to those who currently sit. In the case of cabinet officers, of course, the President is free to appoint anyone he chooses as a replacement.

[77] In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall conceded that the President's decision power was absolute in the "political field" of foreign affairs. Id. at 166. As a consequence, the Secretary of State has no "independence" in the formulation of relations with foreign governments, and Congress could not constitutionally reallocate this inherently executive responsibility by statutory manipulation. Also, under Elrod v. Burns, 427 U.S. 347 (1976), which sanctions the patronage discharge of "policymaking" officials because they may be in a position to "thwart the goals of the in-party," id. at 367, the Secretary of State would presumably be first on the list of vulnerable policymakers who could so "thwart" presidential policy. This aspect of *Elrod* was not compromised by Branti v. Finkel, 100 S. Ct. 1287 (1980), in which the Court rejected the patronage discharge of two assistant public defenders.

[78] The classic situation arose when Andrew Jackson ordered the district attorney to discontinue condemnation proceedings on behalf of the United States concerning the jewels of the Princess of Orange. The jewels had been imported into the United States without payment of duty and, while condemnation proceedings were pending, the President learned that they had been stolen from the House of Orange and decided to return them. In an opinion by Attorney General Taney, it was said that the President, under his power faithfully to execute the laws, could order the Attorney General to dismiss the prosecution and return the jewels. The district attorney might ignore this order at his peril, since the President could replace him with someone agreeable to dismissal. The President could not, however, order the dismissal himself. 2 Op. Att'y Gen. 482, 489 (1831).

President has the right to control the prosecutorial discretion of the Attorney General.[79] This power is subject to limits, however. Once a prosecution begins, the due process clause forbids interference in the decision process by the President or any outsider. But the President may control the prosecution and remove the Attorney General if he or she refuses to prosecute or refuses to dismiss a prosecution.

Many decisions made by executive officers, even those operating in areas traditionally controlled solely by the President, spring from statutory authority granted by Congress. While the President may desire to control this kind of decisionmaking, Congress can place limits upon his power to do so.[80] There is no question, for example, that Congress has the right to enact environmental legislation and to place the final decision on implementation of the Clean Air Act in the Administrator of the EPA. The President cannot simply usurp that decision as part of his executive function. However, any President interested in achieving coordination of policymaking would maintain that there is a difference between deciding for a subordinate and exercising management control over the decision process. In the former case the subordinate acts solely as a convenience to the executive branch; in the latter the subordinate has a decisional role assigned by Congress.

There are several ways for the President to ensure management control without usurping the decision process. The most emphatic method is to threaten subordinates with removal if they do not cooperate. As Jody Powell put it to the leaders of the EPA: If you don't do as the President says, you can look for work elsewhere.[81] But removal is a doomsday machine; it can be both an overwhelming and an inadequate device for controlling or formulating policy. Like the principle of massive retaliation in defense policy, removal is such an extreme solution that it is, as a practical matter, unavailable in the ordinary course. Moreover, where the subordinate sought to be removed has strong supporters in Congress or among influential interest groups, it is too costly politically to utilize as a policymaking instrument. As a result many Presidents would rather suffer occasional insubordinations than risk continual confrontations.

To be effective, the power to remove must imply the lesser power to counsel subordinates privately and to consult before the axe falls. Any other analysis would render the President a helpless giant when it comes to coordinating the policymaking functions of his subordinate officers. Not only does the removal power suggest authority to oversee policymaking, but the article II power to require the written opinion of subordinates also implies an ability to confer and discuss policy matters.

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[79] Directly under the Attorney General is the Office of the Solicitor General, whose function is to reflect the position of the United States before the Supreme Court and to coordinate—and often override—agencies' understandings of the government's position. See, e.g., Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976), where the Solicitor General decided which agency should have jurisdiction to control discharges of radioactive materials into navigable waters, and then argued its position to the Court. It has never been suggested that this coordination function, which is clearly executive in nature, should not be placed in the hands of the President and Attorney General.

[80] In Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), the court held that President Nixon could not legally discharge the Special Prosecutor, Archibald Cox, because of a valid Department of Justice regulation that limited such discharge to situations in which the special prosecutor was guilty of an "extraordinary impropriety." Had there been no such regulation, the President's power to fire presumably could not have been successfully challenged. Cf. L. Tribe, supra note 72, at 19 (arguing that Congress could constitutionally by legislation insulate a special prosecutor from presidential removal). See also Kendall v. United States, 37 U.S. (12 Pet.) 524, 610-12 (1838).

[81] See note 13 and accompanying text supra.

Ultimately, this power to control, coordinate, or guide the policymaking of subordinates may be the only way to keep agencies accountable to the executive branch and the electorate. The basic message of *Myers* is that under article II the President "may properly supervise and guide"[82] the decisions of administrative officers.

As a theoretical matter, this constitutional authority to control policy should extend to chairmen of independent agencies over whom the President has the power of appointment and removal.[83] In a collegial body of five or more commissioners, conferences with the chairman will not ensure totally coordinated policymaking. But the "executive role" of independent agency chairmen is considerable, especially in personnel and budget matters, and it is also said to dominate policy decisions that arise in the rulemaking process.[84] If, for example, the President wants the chairman of the ICC or the CAB to emphasize deregulation as part of a rulemaking program, he should be free to appoint officials with those views, to meet with them privately about those matters during their stewardship, and to remove them as chairmen if they fail to deliver.

C. *The Need for Consultative Privacy*

Assuming the President has executive power to control the policymaking of cabinet officers, related executive officials, and, to a lesser extent, chairmen of independent agencies, the question remains to what degree should contacts with these officials remain private and beyond the scrutiny of the public? The President's right to consult with White House staff and advisors and their right, in turn, to meet privately with White House staff subordinates on behalf of the President are also implicated by this question. To answer this inquiry it is necessary to examine the scope of executive privilege as well as the scope of White House staff consultative privacy when Congress has not legislated on the matter.

1. *The President's Privilege*. In *United States v. Nixon*,[85] the Supreme Court carved out a privilege of confidentiality for conversations between the President and his staff, reasoning that they "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. . . . The privilege is fundamental to the operation of Government and inextricably rooted in the separa-

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[82] 272 U.S. at 52.

[83] Professor Cary reports that when he was chairman of the SEC he met frequently with Presidents Kennedy and Johnson on policy matters. See W. Cary, supra note 71, at 13-26.

[84] See D. Welborn, Governance of Federal Regulatory Agencies 137 (1977). Professor Welborn also suggests that the chairman's power will increase as agencies have to deal with the effect of the sunshine law on formal meetings. Id. at 168 n.2. See also Zamir, Administrative Control of Administrative Action, 57 Calif. L. Rev. 866 (1969).

[85] 418 U.S. 683 (1974).

tion of powers under the Constitution.''[86] This privilege should apply equally when presidential staff and advisors seek to confer in private with cabinet officers and administrators of executive agencies, for they also need ''to explore alternatives'' in setting policy. The ability to function effectively protected by the separation of powers extends to the entire executive branch. As the *Nixon* Court pointed out, ''[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.''[87]

Private discussions between the President and his advisors concerning the relationship of inflation or energy policy to problems of the environment, safety, or health fall under this privacy umbrella. Discussions on these subjects during a cabinet meeting would be especially sensitive, but other meetings among the President, cabinet officers, and senior advisors, such as the discussions with Marshall and Schultze about the cotton dust rules, should be protected for similar reasons. So long as the President is directly involved in the discussions, the need for an executive privilege is strong.

The executive privilege relating to control of administrative officials is not unbridled. One restraint on secret policymaking by the President is inherent in the concept of separation of powers, requiring no judicial intervention. If the public is worried about the veil of secrecy cloaking all discussions between a President and his cabinet officers, the established practice of cabinet members going before Congress to answer questions can serve as an antidote. This separation of powers mechanism, reflected in early practice under the Constitution,[88] checks the exercise of executive privilege by subjecting the decisions of executive agency officials to public scrutiny. Of course, its effectiveness is dependent upon electing a President who honors the tradition, something that is not guaranteed to occur.[89]

Another check on the use of the presumptive executive privilege emerges from the *Nixon* case. The Court emphasized that the privilege is limited by countervailing constitutional interests, such as due process.[90] The overriding interest in that case was the needs of the criminal justice system. A comparable interest emerges from the present inquiry, although it is grounded in civil, rather than criminal, process. The due process limitation in *Nixon* comes into play if a President seeks to go beyond coordination of policy to control of outcomes in adjudication.[91] This distinction between rulemaking and adjudication helps to confine the executive privilege doctrine and should discourage future Presidents from seeking to exploit the privilege beyond the policymaking context. For example, if a President intervened to direct the issuance of a television license to a campaign contributor, those participating in the licensing process could raise a due process objection[92] that might move a court to require any presidential conversations with the FCC commissioners to be placed in the record. A similar situation can arise in connection with executive officials, even though cabinet officers and departmental heads are likely to find that their policymaking function is larger than their adjudicative one;[93] if it does arise, as it did in the Quarles-Flanigan situation, when the White House sought to influence the conduct and outcome of litigation, there is nothing in the relationship between the executive agency and the President that should override the due process interests.

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[86] Id. at 708 (footnote omitted). The Court went on to state that outside of the national security context the privilege was presumptive rather than absolute, and that it must yield to legitimate interests of the ''adversary system of criminal justice.'' This due process interest was present because President Nixon attempted to invoke executive privilege to defeat compliance with a judicial subpoena in a criminal proceeding. This dark side of *United States v. Nixon* should not arise in the kind of policymaking coordination discussed in this Article.

[87] Id. at 705 (footnote omitted).

[88] See E. Corwin, supra note 74, at 296; A. Schlesinger, supra note 54, at 390 (asserting that this practice made for ''openness and responsibility in government'').

[89] President Nixon was accused of engaging in a ''calculated disparagement of the cabinet'' by shifting responsibility to White House aides and then cloaking these aides with executive privilege when they were called upon to testify before Congress. A. Schlesinger, supra note 54, at 252-53.

[90] 418 U.S. at 709.

2. *The White House Advisor's Privilege*. The situation is different when it is the President's advisors who want to engage in privileged communications with cabinet officers, executive agency heads, or other agency officials. Although this is the most frequent kind of contact,[94] it is not clear that this type of "presidential" involvement deserves the same article II protection.

The executive privilege undoubtedly has a "vertical effect," since its purpose is to protect conversations between the President and his advisors, cabinet officials, and administrators. It is not so readily apparent, however, whether the privilege has a "horizontal effect" between White House staff and agency staff. The protections that allow some congressional check on secret decisionmaking by cabinet officers do not apply to presidential aides. White House staff members are not subject to Senate confirmation, nor do they traditionally appear before congressional committees. For these reasons the extension of executive privilege to the staff must be separately justified.

An argument in favor of the horizontal effect is that the President does not have the individual capacity to control the bureaucracy personally. If he cannot rely on his staff to carry out most executive policy, he cannot discharge his responsibilities under article II. Under this analysis the President instructs his White House staff on administration priorities, but turns over to them the actual contact with subordinates in the agencies. Some case law recognizes the practical necessity of this view.[95]

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[91] This raises the traditional distinction between rulemaking and adjudication offered by Justice Holmes in Bi-Metallic Inv. Co. v. Colorado, 239 U.S. 441 (1915), which plays off the due process interest established for informal adjudication in Londoner v. Denver, 210 U.S. 373 (1908).

[92] See Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959); Peck, Regulation and Control of Ex Parte Communications with Administrative Agencies, 76 Harv. L. Rev. 233 (1962).

[93] Independent agency commissioners often perform a role similar to appellate court judges in that they regularly review adjudications by administrative law judges who work in their agencies. This role is rarely played by executive agency heads or cabinet officials. See text accompanying notes 67-68 supra.

[94] In the strip mining rule, for example, the major contact was between White House and CEA staff and lower officials of the Department of the Interior who worked in the Office of Surface Mining. See notes 17-24 and accompanying text supra.

The fear often expressed, however, is that White House staff may use their positions to pursue agendas of their own that only vaguely reflect presidential direction.[96] By cloaking these political messengers with a privilege of secrecy, anonymous government by unaccountable bureaucrats is encouraged. This view suggests that presidential accountability can be as easily frustrated as vindicated by the unrestrained use of White House staff. Unfortunately, most of the proposals to guard against these consequences are themselves fraught with valid apprehensions. Nevertheless, differential treatment between the vertical and horizontal effects of the privilege need not offend article II.

The basic question is whether Congress could constitutionally require White House staff contacts with agency subordinates to be made on the record or even prohibit them altogether. It would in all likelihood be unconstitutional under *United States v. Nixon* for Congress to attempt by legislation to deprive the President of his executive privilege in private vertical dealings with staff and cabinet officers. The President is not involved, however, in a horizontal exchange of views. Thus, if one extended the privilege automatically to cover such dealings, there would be no way, absent written delegation, to determine if in fact the White House staff was executing a previously discussed presidential policy or creating one of its own. For this reason the *Nixon* privilege could be viewed as personal to the President in dealings with subordinates.[97] In short, personal presidential contact makes the privilege available; lack of direct contact renders it unavailable.

While this is a burdensome interpretation for the modern presidency, it would reflect the importance the President attaches to a particular contact and provide a check against the abuse of executive privilege, limiting its scope to those minimum contacts that are essential to the functioning of the executive branch. Under this analysis secret policy coordination would take place only at the presidential level; if it were given lesser status, it could not share in the executive's privilege.

But this minimalist approach unrealistically restrains the making of executive policy. It is obvious that no President can personally direct domestic policy and still discharge the other responsibilities of the office. A President should at least have the power to convert a contact between his staff and agency subordinates into a "presidential communication" by explicit instructions in advance. Written delegation to staff must be able to serve the same function as a direct presidential contact if presidential policy coordination is to be effective. Where there is no explicit delegation, however, the constitutional basis for a privilege of confidentiality is weakened. In this situation congressional limitations upon executive confidentiality may be strong enough to override a generalized claim of executive privilege.[98]

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[95] In Myers v. United States, 272 U.S. 52, 117 (1926), Chief Justice Taft recognized that in order to execute the laws the President must be able to "select those who were to act for him under his direction."

[96] Many of the points made by William T. Coleman are applicable here, see note 44 and accompanying text supra.

[97] *Nixon* involved only the issue of the confidentiality of conversations between the President and his close advisors. 418 U.S. at 703. It therefore did not deal directly with the confidentiality of the advisors' communications with other executive officials. In discussing the scope of executive privilege, however, the Court referred to "Presidential communications" in a way that could encompass communications between a presidential advisor and agency subordinates. The Court also showed concern for a "President and those who assist him." Id. at 708. The question ultimately to be resolved is whether the privilege of White House advisors and agency subordinates "relates to the effective discharge of the President's powers." If so, it has a constitutional base. Id. at 711.

However, there are no congressional enactments that seek to test the limits of executive privilege in this manner, and so this potential constitutional crisis has not arisen. Practically speaking, White House staff members are virtually unrestrained by legislation in their dealings with agency staff on policy matters.[99] One wants to read the lack of rules in this area as indicating that Congress does not believe it is desirable to restrict the private contacts of White House staff. Although extracting meaning from congressional silence is a treacherous activity, it cannot be avoided in this case, because the relative competence of one branch to confine the activities of the other is at stake. *Youngstown Sheet & Tube Co. v. Sawyer*[100] teaches that where Congress has been silent, the President has considerable room to assert his executive power. As Justice Jackson stated in his famous concurrence:

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility.[101]

In this "zone of twilight," the critical inquiry is whether congressional silence on the subject of White House staff activity is the product of informed consent. The next section discusses the various approaches Congress has taken to control the executive branch, short of direct limitations upon the "executive" privilege of White House staff.

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[98] In order to protect against policymaking by unchecked and unaccountable political assistants, Congress might want to pass legislation limiting the use of the executive privilege to contacts made directly by the President or by those working under his explicit delegation. Since this issue could be determined by a court in camera, there is no clear reason why the *Nixon* case would render it unconstitutional.

[99] One possible exception is § 307(d)(4)(B)(ii) of the Clean Air Act Amendments of 1977, 42 U.S.C.A. § 7607(d)(4)(B)(ii) (1979), which requires that all written comments to the EPA by the White House, including OMB, be placed in the rulemaking docket. But these written comments are specifically excluded from the record upon which judicial review is based, 42 U.S.C.A. § 7607(d)(7)(A) (1979). These sections do not mention oral contacts, and EPA has taken the position that such interchanges with White House staff do not need to be recorded. The reach of these provisions is currently being tested. See American Petroleum Inst. v. Costle, No. 79-1104 (D.C. Cir., filed Nov. 19, 1979).

[100] 343 U.S. 579 (1952).

[101] Id. at 637. In a footnote at the end of this paragraph, Jackson asks the reader to "compare" *Myers* and *Humphrey's Executor*. This is a cryptic message, but it does indicate that the focus of Jackson's concern in text was upon the presidential removal cases.

III. THE CONGRESSIONAL POWER TO RESTRAIN WHITE HOUSE CONTROL OF AGENCY POLICYMAKING

Congress is not powerless to restrain the President or his staff in dealing with administrative agencies. Under our scheme of separation of powers Congress can frequently check presidential power through legislation. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court recognized that presidential powers interact with those of Congress, so that when Congress has expressed its will in a manner incompatible with presidential action, the executive power is "at its lowest ebb."[102] As a result, the President has rarely deemed it advisable to contradict an express legislative will. If Congress passes a statute designed to achieve a stated objective, it does not matter whether the particular decisionmaker is an independent agency or an executive agency or whether the President "controls" the decision; Congress's will is to be respected.

Congress has frequently legislated on matters related to executive control of decisionmaking, although mostly in an indirect manner. The most common areas of legislation are the budgetary process, the delegation of statutory duties, and procedural restraints upon agency policymaking. A review of this experience should help to determine whether or not congressional silence on the legitimacy of horizontal contacts between White House and agency staffs is informed.

A. *The Budgetary Process*

In the early years of the administrative state, Congress dealt directly with each agency on its annual budget requests, thus maintaining substantial control over agency activities, including policymaking. This was, however, a costly and cumbersome process, and in 1921, with the passage of the Budget and Accounting Act,[103] which granted the President the power to submit an annual budget for executive agencies to Congress, considerable practical control over administrative policymaking shifted to the executive branch. A further shift occurred when the Act was amended to include independent commissions and boards within the President's budgetary control.[104] Today, the Office of Management and Budget (OMB) exercises central control over agency budgets, and frequently over their policies as well.[105]

But Congress still retains considerable control over the budgetary process and could withdraw agencies from OMB jurisdiction should it perceive the need to do so. Indeed, Congress has recently seen fit to retain direct budgetary control over certain independent agencies.[106] By this ebb and flow of control over agency budgets, Congress demonstrates a willingness both to accede to and to check presidential control over administrative policymaking. Since Congress also has recourse to the General Accounting Office and the recently created Congressional Budget Office, there is little reason to believe that it is helpless in the face of executive manipulation of the budgetary process.[107] If the proposal now being discussed for a regulatory budget ever becomes a reality, Congress will be in a position to monitor closely the impact of regulation upon the public.[108]

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[102] Id. at 637.

[103] Pub. L. No. 67-13, 42 Stat. 20 (1921) (codified at scattered sections of 31 U.S.C. (1976)).

[104] Section 2 of the original act had defined "department or establishment" to include "executive department [or] independent commission." Id. § 2. The 1939 amendment added the phrase "independent regulatory commission or board" as a reaction against uncertainties caused by the *Humphrey's* decision. See 31 U.S.C. § 2 (1976); 84 Cong. Rec. 2315 (1939) (remarks of Representative Warren).

[105] In 1970 the Bureau of the Budget, which had earlier been transferred from the Treasury Department to the Executive Office of the President, became OMB. Reorganization Plan No. 2 of 1970, 84 Stat. 2085.

B. *The Delegation Process*

Congress exercises influence over administrative policymaking simply by deciding where to place administrative responsibility. For example, Congress can blunt the fear of excessive executive interference by assigning a particular statutory duty to an independent agency. The meaning to be given to a congressional choice of the independent agency format has never been clearly established. But the structure of these agencies does suggest a congressional design to insulate their decisions from presidential politics. For example, by balancing the membership of these agencies between the two political parties and by creating fixed terms that may exceed a President's term of office, Congress has indicated that these agencies should function outside the realm of politics and perhaps within some abstract mold of balanced or rational decisionmaking.[109]

Thus, if Congress has been able to restrict executive and White House staff influence over administrative policymaking by establishing an independent agency, a reverse inference may presumably be drawn when Congress creates an executive agency. By choosing to christen an executive agency as the policymaking vessel, Congress makes a considered judgment about the need for stronger executive and political control. Indeed, a fair reading of the removal cases suggests that if Congress places a policymaking responsibility in an executive branch agency, it cannot keep the President from exercising his duty to control the subordinate decisionmaker.[110] Any attempt to do so would run afoul of the President's power under article II.

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[106] For example, Congress has exempted the Consumer Product Safety Commission, the ICC, and the Commodities Futures Trading Commission from OMB budget review. See 15 U.S.C. § 2076(k) (1976); 31 U.S.C. § 11(j) (1976); 7 U.S.C. § 4a(h) (1976).

[107] As demonstrated by the recent struggle over executive impoundment of appropriated funds, Congress can be an effective advocate of its own budgetary interests. When President Nixon asserted an inherent power to impound funds appropriated for government programs, Congress passed the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified in part at 31 U.S.C. §§ 1400-1407 (1976)), which severely restricted the President's use of impoundments. See also Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973) (finding no inherent presidential impoundment power).

[108] The regulatory budget would allow Congress to set upper limits on the costs of regulations imposed on the private sector, and to divide these costs among the various agencies. See generally DeMuth, The Regulatory Budget, 4 Regulation 29 (Mar./Apr. 1980) (approving concept in abstract but questioning feasibility of implementation).

[109] The independent agencies are organized to be free from executive control. Their members are not only entitled to fixed terms with for-cause removal restrictions, but they are selected on a bipartisan basis. See discussion by Leventhal, J., Environmental Law Institute Colloquium, Spring 1979, at 95 (F. Anderson ed.).

A different aspect of the problem of White House staff influence over executive agency subordinates arises when Congress places the decision locus not in an independent commission, but in the President himself. This occurs when Congress wants the President to have direct responsibility and control over certain significant policies. Tariff decisions fall into this mold,[111] as do policy decisions involving such matters as the routes for the Alaska pipeline[112] and for international airlines[113] and export licenses for nuclear material.[114]

The issue is not simply a tug-of-war for decisionmaking control between Congress and the President. In some matters Congress grants the President direct decisional responsibility rather than protecting its prerogatives through the insulative device of an independent agency. In others it chooses to place responsibility in executive agencies, presumably aware of the consequences of that choice for presidential control.[115] Conversely, the President may not always want direct political responsibility and will favor a grant of authority to an executive or even an independent agency.[116]

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[110] Congress still retains the discretion, however, not to grant rulemaking power to executive agencies or to do so only with formal procedures. See text accompanying notes 135-37 infra.

[111] The Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, established a Tariff Commission, which made recommendations to the President that he could accept or reject as he saw fit without judicial oversight. See United States v. George S. Bush & Co., 310 U.S. 371 (1940). Today these recommendations are made by the International Trade Commission. See 19 U.S.C. §§ 2251-2253 (1976).

[112] The decision on the pipeline was to be made by the President subject to congressional review. See 15 U.S.C. §§ 719e,f (1976).

[113] 49 U.S.C. § 1461 (1976). See also Exec. Order No. 11,920, 41 Fed. Reg. 23,665, 23,666 (1976) (prohibiting private ex parte contacts with White House staff while route certifications are before the President).

[114] See the Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (1978) (codified at 22 U.S.C. §§ 3201-3282 (Supp. II 1978)). Congress vacillated on the question of who should have political control of this sensitive area, shifting the locus of decisionmaking power first from the State Department to an independent agency, the Nuclear Regulatory Commission, and then back to executive control by the President. The NRC continues to have a role, albeit more limited. If the State Department approves an export license, the NRC may then render its opinion. If it disapproves of the State Department action, the President may overrule, but then the matter is laid before Congress for 60 days, during which time that body can veto the presidential decision

[115] Congress has also tried to have it both ways in a single delegation. The Department of Energy Organization Act was designed to unify energy policy in a cabinet-level executive agency. Congress, however, decided that the functions of price setting for natural gas, formerly performed by the Federal Power Commission, should be retained by a new independent agency, the Federal Energy Regulatory Commission, located within DOE. Opponents of deregulation feared placing price-setting power in the hands of cabinet officials and preferred the protections that would be available with a collegial body, such as the Sunshine Act, see text accompanying notes 123-30 infra. For a good discussion of the political infighting that led to this Jonah-in-the-whale compromise, see Byse, The Department of Energy Organization Act: Structure and Procedure, 30 Ad. L. Rev. 193, 198-203 (1978).

[116] This situation occurred recently when the President failed to endorse the Kameny Commission's recommendation that nuclear power safety responsibilities be removed from the NRC and placed in a single administrator subject to greater presidential control. See President's Remarks in Response to the Report of the Commission on the Accident at Three Mile Island, 15 Weekly Comp. of Pres. Docs. 2202 (Dec. 7, 1979). The President had earlier opposed the merger of the NRC into the Department of Energy "[b]ecause public concerns about the safety of nuclear power are so serious." President's Energy Reorganization Message to Congress, 35 Cong. Q. 404 (1977)

Sometimes, however, Congress has recognized that it delegated too much responsibility directly to the President. For example, President Truman once complained that looking over and signing papers on his desk "takes 3 hours every night."[117] Congress responded by passing the Presidential Subdelegation Act of 1951,[118] which permitted the delegation of more than 400 duties then imposed on the President.[119] Most of the listed duties seem trivial;[120] some, however, involve responsibilities for Indian affairs and the use and exploitation of government land that would hardly be taken lightly today.[121]

Perhaps the most interesting aspect of the Act for present purposes is that it specifically preserves the President's "inherent right" to delegate without express authorization.[122] Congress thus appears to recognize that the President has power under article II to delegate duties to his own staff and other executive officials that cannot be monitored by Congress through the publication requirements of the Subdelegation Act. Arguably, Congress also recognizes the President's need to delegate supervisory responsibilities over executive officials to the White House staff without public notice of the delegation. At a minimum, the Act reflects a long-standing congressional concern with the burdens on the presidency and an acceptance of the theory of inherent power to manage executive branch policymaking.

C. *The Use of Procedures*

Congress has achieved a certain degree of control over the activities of the White House staff simply by imposing procedural requirements upon the administrative agencies they seek to influence. These requirements govern public meetings, access to documents, and procedural rights in rulemaking.

In the Government in the Sunshine Act[123] Congress has required collegial agencies (those that have two or more appointed members) to open their meetings to public scrutiny.[124] The policy of the Act is to make public the decision process of collegial bodies. It thus ensures that independent agencies are unlikely to be influenced by private White House staff contacts during the informal rulemaking process.[125]

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[117] See S. Rep. No. 1867, 81st Cong., 2d Sess. 1, reprinted in [1950] U.S. Code Cong. Serv. 2931.

[118] Pub. L. No. 82-248, 65 Stat. 712 (1951) (codified at 3 U.S.C. § 301-303 (1976)).

[119] The act provides that "[s]uch designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part." Id.

[120] S. Rep. No. 1867, supra note 117, at 4-6, [1950] U.S. Code Cong. Serv. at 2934-37.

[121] Id. (examples 19-28). These responsibilities are now vested in the Secretary of the Interior. Over the years Presidents from Truman to Carter have used this act to delegate by executive order literally hundreds of duties. See note following 3 U.S.C.A. § 301 (1977 & Supp. 1980).

[122] 3 U.S.C. § 302 (1976) provides:

> This Chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.

[123] Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1976)). See generally R. Berg & S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act (1978).

The reach of the Sunshine Act is a potentially delicate issue. By limiting its coverage to collegial bodies, Congress focused primarily on the independent agencies, which are organized on that basis. Congress thus avoided the larger issue of its constitutional power to require executive agencies under the President's control to be open to public scrutiny. There are, however, a few agencies covered by the Act that do not fit the traditional molds. The Council on Environmental Quality,[126] a three-member body appointed by the President with the advice and consent of the Senate, advises the President on national policies relating to improvement of the environment. The Council avoided a potential confrontation between Congress and the President when it enacted sunshine regulations.[127] The Council of Economic Advisors,[128] on the other hand, has refused to promulgate sunshine rules, relying primarily on the fact that it is part of the Executive Office of the President.[129] Even if the Sunshine Act is eventually limited to independent agencies, it remains a significant congressional tool for regularizing the administrative process and reducing the potential influence of ex parte contacts by the White House.[130]

The Freedom of Information Act (FOIA),[131] which makes government records publicly available upon request, also serves as a congressional device for publicizing the decisional processes of administrative agencies. It is now possible for any interested person to obtain written communications between White House staff and personnel of both independent and executive agencies[132] unless there is a specific exemption from disclosure, such as the narrow exemptions incorporating confidentiality requirements emanating from the concept of executive privilege.[133] Practically, the increasing public disclosure of White House staff memoranda to agency officials will mean that written White House contacts are less likely to be secret. In effect, the FOIA has become a method for public participation in the political process of agency policymaking.[134]

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[124] There are ten specified exceptions to this open meetings requirement, 5 U.S.C. § 552b(c) (1976). In general these exceptions track those contained in the Freedom of Information Act, 5 U.S.C. § 552(b) (1976).

[125] Indeed, the exceptions to open meetings by collegial bodies may not even apply to *formal* rulemaking proceedings. For example, exemption 10 relates to "the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing." Although it is obviously not adjudication, formal rulemaking does involve a determination on the record after opportunity for an agency hearing. The legislative history is in conflict on whether formal rulemaking is within the exemption. See R. Berg & S. Klitzman, supra note 123, at 27-28. At least one commission has decided that it is within the exemption. See 42 Fed. Reg. 13,288 (1977) (Postal Rate Comm'n).

[126] The Council was established by the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified in relevant part at 42 U.S.C. §§ 4321, 4342 (1976)).

[127] See 42 Fed. Reg. 8673 (1977) (proposed rules); 42 Fed. Reg. 20,818 (1977) (final rules)

[128] The Council was established by the Employment Act of 1946, Pub. L. No. 79-304, 60 Stat. 23 (1946) (codified in relevant part as amended at 15 U.S.C. § 1023 (1976)). It is composed of three members appointed by the President with the advice and consent of the Senate.

[129] Discussion by author with CEA staff, December 1979.

[130] The Sunshine Act also amended the APA by adding a restriction against ex parte contacts to the formal adjudication and rulemaking requirements. 5 U.S.C. § 557(d)(1) (1976). See also 5 U.S.C. § 551(14) (defining "ex parte communications"). See generally text accompanying notes 138-39 infra.

[131] 5 U.S.C. § 552 (1976).

[132] The CEA maintains that it is not an "agency" for purposes of FOIA coverage. The Council relies upon legislative history of the FOIA that exempts the President's immediate staff or units in

A third congressional technique for controlling White House contacts with agency personnel is the utilization of procedures imposed by the Administrative Procedure Act (APA). Congress is free to control White House influence over agency rulemaking by mandating that rules be promulgated according to the formal rulemaking requirements of the APA,[135] which ensures that factual and policy matters arising in a rulemaking are subject to full hearings and on-the-record judicial review based on the substantial evidence test.[136] Just as locating a substantive program in an independent agency reduces the degree of White House staff contact and control, imposing formal procedures reduces the possibility that nonrecord contacts will affect the outcome of administrative decisions, because it is difficult to see how secret contacts by the White House could materially affect a decision made with this kind of formality. Since Congress can extend the formal rulemaking process to executive as well as independent agencies,[137] the use of procedures is a means of asserting control over executive policymaking that might not be achievable in a more direct manner.

In 1976 Congress amended the APA explicitly to forbid ex parte contacts in formal rulemaking.[138] While there was no indication that Congress was directing this amendment at contacts by the President or the White House staff,[139] the action reflects strong congressional concern about the problem of ex parte communications. With this addition, which bolsters the record restrictions of formal

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the Executive Office whose sole functions are to assist the President. S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 15, reprinted in [1974] 3 U.S. Code Cong. & Ad. News 6285, 6293.

[133] Exemptions 1 (national defense files), 5 (inter- and intra-agency memoranda), and 7 (investigatory records) are likely to include executive branch communications. See 5 U.S.C. § 552(b) (1976). In 1974 and 1976 Congress amended the Act to limit the scope of exemptions 1 and 7. Pub. L. No 93-502, § 2, 88 Stat. 1561 (1974); Pub L. No. 94-409, § 5(b), 90 Stat. 1241 (1976). See NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); EPA v. Mink, 410 U.S. 73 (1973). President Ford vetoed the 1974 amendment to exemption 1 because of executive privilege concerns, 120 Cong. Rec. 36,243-44 (1974), but Congress overrode his veto, id. at 36,622, 36,865.

[134] See Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1670 (1975).

[135] 5 U.S.C. §§ 553, 556-557 (1976).

[136] Id. § 706.

[137] The Food and Drug Administration, for example, is an executive agency that has long been required to follow formal rulemaking procedures. 21 U.S.C. § 355(h) (1976). See generally Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973).

[138] Pub L. No 94-409, § 4, 90 Stat. 1241 (1976). The prohibition against ex parte communications was added to § 557 of the APA, which applies both to formal rulemaking and to adjudication.

[139] The prohibition against ex parte communications applies to any "interested person outside the agency" 5 U.S.C § 557(d)(1) (1976). This definition appears to be focused on private persons who stand to benefit from the agency rulemaking. While White House staff members may be "outside the agency," they are not likely to be "interested persons" in this sense.

rulemaking, it is doubtful that any agency conducting formal rulemaking proceedings would be comfortable with secret contacts from the White House staff.

Congress can also specify procedures for individual agency rulemaking proceedings by organic legislation, as it has done recently with the FTC and the Consumer Product Safety Commission.[140] For these agencies Congress has created a category of hybrid rulemaking that blends informal and formal rulemaking.[141] The on-the-record limitations of formal rulemaking are somewhat relaxed, but the role of the courts on judicial review is greater than it is for informal rulemaking.[142] It is questionable how much congressional control of ex parte contacts ought to be implied by the existence of a hybrid procedure. Since Congress has not employed formal rulemaking directly, the legislative concern with ex parte communications does not appear to be so substantial. These statutory variations demonstrate that Congress can and will impose restrictions on informal rulemaking when it perceives the need to do so, and these restrictions may or may not include explicit ex parte provisions.[143] Under these circumstances, there is little need to construe congressional silence as favoring a blanket prohibition against ex parte contacts.

This analysis suggests that when Congress permits an agency to promulgate rules pursuant to ''pure'' informal rulemaking, it has considered and rejected other alternatives that would more effectively restrain the White House. This interpretation is buttressed by Congress's decision in 1976 not to extend the ex parte communications provision to informal rulemaking.[144] Congress undoubtedly realizes the current tensions that arise when the White House staff intervenes in agency policymaking. If Congress wants to restrict this practice to its constitutional minimum, it can do so by employing formal rulemaking. Failure to impose formal procedures suggests that Congress realizes that the White House necessarily plays a political role in formulating agency policy. One need only recall the events surrounding the strip mining and ozone rules[145] to realize that Congress itself may want to intervene in the political process of rulemaking, either directly or through the President. In other words, Congress understands the

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140. See, e.g., Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, tit. II, § 202(a), 88 Stat. 2193 (1975) (codified at 15 U.S.C. § 57a (1976)); Consumer Product Safety Act, Pub. L. No. 92-573, § 9, 86 Stat. 1215 (1972) (codified at 15 U.S.C. § 2058 (1976)). See generally Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 317-19 (1978).

141. See Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185 (1974); Williams, ''Hybrid Rulemaking'' under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. Chi. L. Rev. 401 (1975).

142. The Occupational Safety and Health Act, for example, provides for § 553 informal rulemaking with judicial review of the whole record according to the substantial evidence standard. 29 U.S.C. § 655(b) (1976). The courts have been struggling with the contradiction inherent in this requirement of on-the-record review of a nonrecord proceeding. See Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 472-76 (D.C. Cir. 1974).

143. While Congress is free to experiment with ex parte restrictions in rulemaking that affect the White House, it must of course respect the powers of control conferred by article II on the President or his delegates, including the confidentiality requirements of executive privilege. To date, however, Congress has not sought to restrain the President directly and the issue has not been posed.

144. See text accompanying note 179 infra.

145. See notes 11-24 and accompanying text supra.

political nature of rulemaking, and it may prefer to leave the President and the White House free to control agencies whose decisional independence can cause political problems for everyone.[146]

IV. The Judicial Power to Control Ex Parte Contacts by the White House

The preceding discussion demonstrates that the President and the White House staff have legitimate privacy interests in coordinating and controlling agency policymaking that Congress cannot or, as a practical matter, would not abrogate. But Congress is not the only branch that evaluates the role of the executive in administrative decisionmaking—the courts supervise agency decisions on judicial review. While this supervision usually involves interpreting the will of Congress as it pertains to control of the executive, the courts increasingly are creating common law and due process standards of acceptable administrative decisionmaking. These standards, while not necessarily directed at the executive branch, inevitably affect presidential powers of coordination.

The most vivid example is the recently developed judicial doctrine that extends prohibitions against ex parte contacts from the formal process to the informal process,[147] which includes both informal rulemaking[148] and informal adjudication.[149] To date the development of standards for ex parte communications has been limited to nonrecord contacts by private parties. However, respected legal commentary[150] and extrajudicial musings by influential federal judges[151] reveal an inclination to extend the restriction on ex parte contacts to the President and the White House. The courts are likely to be called upon to resolve this issue before long.

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[146] In hearings on regulatory reform legislation designed to structure the President's control over agency policymaking, Senator Percy posed the dilemma as follows: "How do we come to a national policy if the President of the United States can't intervene in a case . . . where [administrative] action might totally contradict a Presidential goal and mandate for the country on something as important as energy." Regulatory Reform Legislation: Hearings on S. 262, S. 755, S. 93 and Other Regulatory Reform Legislation Before the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess., pt. 2, at 118 (1979) [hereinafter cited as Senate Hearings].

[147] See United States Lines, Inc. v. FMC, 584 F.2d 519 (D.C. Cir. 1978) (informal adjudication); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) (informal rulemaking). Cf. Action for Children's Television v. FCC, 564 F.2d 458, 474-77 (D.C. Cir. 1977) (limiting *Home Box Office* to rulemakings involving "valuable privileges"). See also Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978) (regulating intra-agency contacts).

[148] This procedure is governed by § 553 of the APA, 5 U.S.C. § 553 (1976).

[149] This category of decisionmaking is virtually unbounded by APA-imposed procedures.

[150] See Bruff, supra note 28, at 503-05. Others have discussed the subject from a more outcome-oriented perspective. See R. Rauch, supra note 3; Senate Hearings, supra note 146, at 134-51 (testimony of Alan B. Morrison). (Both Rauch and Morrison rely upon Bruff for much of their constitutional analysis.) See also Department of Justice Memorandum, supra note 18.

[151] Judge David Bazelon had the following exchange with Senator Ribicoff during hearings on the regulatory reform legislation:

> Chairman Ribicoff. Should [the ex parte communications prohibition] apply to the President and his advisors as well as the public?
>
> Judge Bazelon. I would say so. That may be a hard one to swallow, but this is an area where courtesy doesn't extend to risking the integrity of the administrative process.

Senate Hearings, supra note 146, at 8.

Before evaluating the application of restrictions to White House contacts, the judicial extension of limitations upon ex parte contacts to private participants in the informal process should be separately considered, because it is not uncontroversial.[152] The serious step of restricting White House communications, which has profound implications for the policy coordination plans of the executive branch, should be taken only if it is clear that the step of extending ex parte contacts to private participants is a sound one. Even if the first step is valid, however, the second step should presumably not be taken if the purpose of and justification for nonrecord contacts by the White House can be differentiated from contacts by private persons in informal rulemaking generally. This section reviews the soundness of the ex parte contact idea in informal decisionmaking and then evaluates its extension to the White House in light of the executive and congressional interests discussed earlier.

A. *The Application of Ex Parte Contact Principles to Informal Decisionmaking*

The making of policy usually occurs in an environment less structured than adjudication because the questions involved transcend individualized interests and the methods of resolving them resist formal standards of proof. Policymaking implies selecting a particular rule or course of action from among several possible choices. If the policymaking framework is a rulemaking, the APA creates an informal process that tries to assure a measure of rationality while recognizing the need for decisional flexibility. But the framework may also encompass "executive" decisions that establish policy by granting exemptions, commencing prosecutions, or approving grants, licenses, or expenditures. In these latter cases the APA is virtually silent on procedures,[153] and thus an "informal adjudication" format has emerged. Historically, judicial doctrine accepted these categories of informal policymaking unless due process interests intervened.[154] Recently, however, the courts on judicial review have looked more carefully at these decisions and their procedures. Relying on the Supreme Court's decision in

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In a colloquium sponsored by the Environmental Law Institute, Judge J. Skelly Wright indicated he was also inclined to extend the restrictions on ex parte contacts to the White House. See ELI Colloquium, supra note 109, at 90-99. See also Wright, Commentary: Rulemaking and Judicial Review, 30 Ad. L. Rev. 461 (1978).

[152] See Association of Nat'l Advertisers, Inc. v. FTC, 617 F.2d 611, 633 (D.C. Cir. 1979) (concurring op. of Wright, J.) (describing the law on ex parte contacts as unsettled). See also Carberry, Ex Parte Communications in Off-the-Record Administrative Proceedings: A Proposed Limitation on Judicial Innovation, 1980 Duke L.J. 65; Nathanson, Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377 (1978).

[153] The one potential exception is § 555(e), which is being read cautiously to impose a statement of grounds for denial upon agency officials. See Dunlop v. Bachowski, 421 U.S. 560 (1975); see generally Verkuil, supra note 140, at 315-17.

[154] See, e.g., Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959), in which the court imposed an ex parte contact restraint upon informal rulemaking because the procedure affected important private rights of a VHF television station.

Citizens to Preserve Overton Park, Inc. v. Volpe,[155] courts have searched for a record supporting the informal decision and scrutinized its contents closely. This close look has exposed weaknesses in the policymaking process and led to the imposition of record-building procedures similar to those in the formal decision process. The prohibition against ex parte contacts is in this sense a procedure to ensure a better record, and the cases have imposed it equally upon informal rulemaking and informal adjudication. Arguably, however, the justifications for the restrictions vary with the particular decision context.

In *Home Box Office, Inc. v. FCC*,[156] the Court of Appeals for the District of Columbia Circuit remanded cable television rules promulgated pursuant to informal rulemaking procedures for a special hearing on the source and nature of all ex parte contacts.[157] In holding that all ex parte contacts should be forbidden, the court rejected traditional views about informal rulemaking. It stated that

> implicit in the decision to treat the promulgation of rules as a "final" event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material—documents, comments, transcripts, and statements in various forms declaring agency expertise or policy—with reference to which such judgment was exercised. . . . As a practical matter, *Overton Park*'s mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings.[158]

This reliance upon *Overton Park* as the basis for rejecting the view that informal rulemaking is a nonrecord proceeding was questioned by Judge MacKinnon in a belated special concurrence.[159] Shortly after this separate opinion was issued, a panel of the District of Columbia Circuit that included Judge MacKinnon decided *Action for Children's Television (ACT) v. FCC*.[160] This opinion refused to apply *Home Box Office*'s ex parte contact restraints to a rulemaking that did not involve the grant of valuable privileges.[161] The *ACT* court perceived a problem in drawing lines between all the types of sources that might influence a decisionmaker. Noting Congress's apparent intent to permit some ex parte contacts, the court chose to "draw that line at the point where the rulemaking proceedings involve 'competing claims to a valuable privilege.' It is at that point where the potential for unfair advantage outweighs the practical burdens, which we imagine would not be insubstantial, that such a judicially conceived rule would place upon administrators."[162]

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[155] 401 U.S. 402 (1971). *Overton Park* involved informal adjudication; namely, a decision by the Secretary of Transportation on whether to expend federal funds for a highway through a state park.

[156] 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

[157] Id. at 58.

[158] Id. at 54 (footnotes omitted).

[159] Id. at 62. Judge MacKinnon filed his concurrence more than a month after the opinion appeared.

[160] 564 F.2d 458 (D.C. Cir. 1977).

[161] Id. at 474. See also United Steelworkers of America v. Marshall, No. 79-1048 (D.C. Cir. Aug. 15, 1980).

The same court decided *United States Lines, Inc. v. FMC*,[163] which applied the ex parte contacts restraints outlined in *Home Box Office* to informal adjudication.[164] The court relied not only on *Overton Park* and its expansive record requirement but upon concepts of due process as well, stating that "[t]he inconsistency of secret *ex parte* contacts with the notion of a fair hearing and with the principles of fairness implicit in due process has long been recognized."[165]

Several questions emerge from these cases. First, what does *Overton Park* require as it relates to ex parte contacts? Does it make a difference whether the administrative action is informal rulemaking or adjudication? Second, to what extent has the Supreme Court's more recent decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,[166] limiting courts to the procedures outlined in the APA, precluded the use of ex parte contact restrictions in informal decisionmaking?

1. Overton Park *and Ex Parte Contacts.* The Supreme Court's opinion in *Overton Park* signaled a new era in judicial review. At issue was a definition of the scope of review contemplated by the "arbitrary or capricious" standard of the APA.[167] The Court, while nodding toward the traditional presumption of regularity accorded administrative decisions, subjected an informal adjudication to "a thorough, probing, in-depth review" and a "searching and careful" independent inquiry into the facts. Relying on the "whole record" requirement of the APA,[168] the Court held that the administrative record that was before the Secretary must be presented to the reviewing court to enable it to undertake its independent evaluation. The Court emphasized however, that formal administrative findings were not required.

While it is a dramatic case, *Overton Park* is only part of the picture. The Supreme Court also expounded standards of review for informal adjudication in *Camp v. Pitts*,[169] emphasizing that if, unlike the situation in *Overton Park*, a

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[162] 564 F.2d at 477 (citations omitted). After these cases there is some doubt as to the reach of *Home Box Office*. Since Judge MacKinnon concurred in that case and participated in *ACT*, he may have viewed *Home Box Office* as a valuable-privilege case similar to *Sangamon Valley*. It has been pointed out, however, that the pay cable rules at issue in *Home Box Office* were much more general in their focus than the license determination in *Sangamon*. See Robinson, The Federal Communications Commission: An Essay on Regulatory Watchdogs, 64 Va. L. Rev. 169, 227-30 (1978).

[163] 584 F.2d 519 (D.C. Cir. 1978).

[164] The challenged administrative action involved the issuance of an exemption from the antitrust laws for joint service agreements under § 15 of the Shipping Act, 46 U.S.C. § 814 (1976). This was "informal adjudication" only because the Federal Maritime Commission and the court on review interpreted the statutory "hearing" requirement as not necessitating formal adjudication under §§ 554 and 556-557 of the APA. Compare Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir.), cert. denied, 439 U.S. 824 (1978) (holding that a "hearing" requirement triggers formal adjudication).

[165] 584 F.2d at 539.

[166] 435 U.S. 519 (1978).

[167] 5 U.S.C. § 706(2)(A) (1976).

[168] Section 706 of the APA, which apparently is applicable to all of the scope-of-review provisions, states: "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706 (1976).

[169] 411 U.S. 138 (1973).

"contemporaneous explanation" for the challenged action exists, the propriety of the administrative findings must be evaluated in light of the record already made.[170] *Camp*, therefore, qualifies *Overton Park* by requiring the reviewing court to confine itself to the administrative record if one exists—the court cannot independently build a record.

Despite this apparent qualification, courts have not relied on *Camp* to moderate the message of *Overton Park*.[171] The courts of appeals have eagerly extended *Overton Park* to the informal rulemaking arena without discussing either its relevance in those situations or the *Camp* reservations.[172] In informal rulemaking, both a "contemporaneous explanation" and an administrative record are likely to exist in the form of a "concise statement of basis and purpose" and the comments and other information received in connection with the rulemaking proceeding. There simply is no *Overton Park* problem of post-hoc rationalization and there is almost certain to be more of an explanation and record than the *Camp* Court found tolerable.

On these grounds alone, one might temper the demands of *Overton Park* in the context of informal rulemaking rather than use the case as a justification for more intensive review. Even though the courts of appeals have not yet so reacted, there are indications that the Supreme Court may be on the verge of reducing the application of *Overton Park* in the informal rulemaking setting. In *Vermont Yankee*, the Court cited *Camp* in discussing the appropriate standard of review of informal rulemaking.[173] The Court also mentioned *Overton Park*, however, so it may be difficult to establish what it will ultimately hold with regard to review of informal rulemaking.[174] There is little doubt, however, that the expectations set forth in *Overton Park* with respect to the administrative record are more appropriate in the informal adjudication setting. Most of the matters that arise in adjudications are more susceptible to findings and record analysis than are the polycentric policy questions found in rulemaking.[175] It is difficult to understand why an informal rulemaking process that satisfies the findings and record requirements of *Camp* should run afoul of *Overton Park*.

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[170] Id. at 143. The Court added that if the finding was not sustainable on the administrative record then the decision must be remanded to the agency for further consideration; in no event was the court itself to build the required record. Id. at 142.

[171] A quick (Lexis) count of the federal cases that cite *Overton Park* since 1971 totals 1,155. *Camp* has been cited only 184 times since 1973. Thus, on the basis of citations it appears that *Overton Park* has virtually eclipsed *Camp* as the precedent for the standard of review.

[172] See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1975), cert. denied, 426 U.S. 941 (1976).

[173] The Court stated that:

> We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must "stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration."
> *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

435 U.S. at 549.

[174] Id. at 549 n.21. In Strykers Bay Neighborhood Council, Inc. v. Karlen, 100 S.Ct. 497, 502 (1980) (Marshall, J., dissenting), Justice Marshall complained that the Court had ignored *Overton Park* in reversing a determination that an environmental decision by HUD was arbitrary and capricious.

[175] For example, the decision to grant a license to operate branch banks involved in *Camp* affected a valuable individual privilege, thus triggering due process concerns. Due process was not

This analysis has implications for the ex parte contact cases. If courts rely on *Overton Park* to prohibit such contacts, the prohibition should occur only in those situations where *Overton Park*, as modified by *Camp*, is offended. Informal adjudication cases with due process aspects are one such situation. Thus, in *U.S. Lines* the court was on secure ground in imposing a structure upon the existing informal record through a restriction on ex parte contacts. The antitrust exemption sought in *U.S. Lines* is a privilege of economic significance awarded to an individual company, much like the branch bank application sought in *Camp*. Even if the *Camp* Court was satisfied with a less carefully constructed administrative record, it does not seem unreasonable to provide a more secure one, especially where the problem of ex parte contacts is explicitly raised.[176]

When it comes to "pure" informal rulemaking that does not involve valuable privileges, the ex parte contact restriction is less justifiable. *Home Box Office* is such a situation. The FCC made a record constructed from the extensive comments it received, and it also made findings in its concise statement of basis and purpose. It is true that extensive ex parte communications occurred, but they were engaged in by all sides and apparently were of value to the commissioners.[177] The major complaint of the court was that these off-record contacts made the agency's findings a "fictional account" of the actual decisionmaking process that "must perforce" be arbitrary. But the record envisaged by *Overton Park* and *Camp* is not so rigorously defined,[178] and the standard of review not so readily offended. If it were, it is doubtful that Congress would have provided for informal rulemaking procedures that specifically excluded the very ex parte contact restrictions the *Home Box Office* court sought to read in on review.[179] It should not be forgotten that informal rulemaking involves "interested persons," rather than "parties" in the usual adjudicative sense of the term. The concept of "ex parte" implies a different decisional structure from that involving mere "in-

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implicated in *Overton Park*, however, because rather than raising a specific individual interest, the plaintiffs were merely asserting a "right" to a more agreeable environment. Although this right may enjoy congressional recognition, it does not rise to the level of rights protected by the due process clause.

[176] The proposition would be less sound if the informal adjudication did not directly raise due process concerns. In this regard Secretary Volpe's difficulties with the Three Sisters Bridge construction are instructive. There the reviewing court invalidated the Secretary's decision to approve construction because the decision had been subject to congressional influence. D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972). The court speculated that the rulemaking might have been held valid despite those "extraneous pressures." Id. at 1247. But it is also doubtful whether the interest the plaintiffs sought to protect rose to due process levels, thereby incorporating ex parte contact prohibitions. Since the issue in the Three Sisters Bridge case was whether a hearing was required by statute before the Secretary approved the construction, the due process issue did not arise directly, although Judge Wright had been willing to address it if the court did not locate procedural rights in the statute itself. D.C. Fed'n of Civic Ass'ns v. Volpe, 434 F.2d 436, 437-39 (D.C. Cir. 1970).

[177] See Robinson, supra note 162, at 228-30.

[178] *Overton Park* does discuss the "full administrative record," but that phrase, while susceptible to expansive meaning standing alone, seems qualified by the Court's acceptance in *Camp* of an administratively created record.

[179] See notes 138-39 and accompanying text supra.

terested persons." One can only have a contact without "parties" present in a proceeding where parties are involved, namely adjudication or formal rulemaking.

2. Vermont Yankee *and Ex Parte Contacts.* In *Vermont Yankee* the Supreme Court emphatically instructed the courts of appeals not to add procedures to informal rulemaking other than those specified in section 553 of the APA. The issue in the case was whether cross-examination on critical testimony in an informal rulemaking was a necessary addition to the section 553 ingredients of notice, comment, and statement of basis and purpose.[180] The Court also criticized the assumption that additional procedural ingredients like cross-examination were justified by the applicable standard of review, noting that "informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. . . . [T]he agency [need only follow] the statutory mandate of the Administrative Procedure Act or other relevant statutes."[181]

With this mandate to comply with the APA, *Home Box Office* bears a heavy burden of justification. The prohibition against ex parte contacts can be viewed as a procedural ingredient much like cross-examination, discovery, or the right to call witnesses. Because it is one of the procedural ingredients from formal adjudication that was specifically left out of section 553 informal rulemaking, adding it judicially flies in the face of the basic message of *Vermont Yankee*.

As a practical matter, however, the FCC and other agencies have imposed ex parte contact restrictions upon themselves in light of *Home Box Office*.[182] If the agencies have done so voluntarily, the *Vermont Yankee* problem does not arise.[183] But some agencies have not yet agreed to restrict ex parte contacts, or have not agreed to restrict them adequately, or would like to change their restrictions if permitted to do so. In these situations, following *Home Box Office* could well lead to a confrontation with *Vermont Yankee*.

In such a case, several "defenses" to the application of *Vermont Yankee* can be raised in the ex parte rulemaking situation. First, it could be argued that the real danger of imposing a requirement of cross-examination on crucial issues was its indeterminacy, a problem that is not present in the context of ex parte contacts. The Court in *Vermont Yankee* feared that an abstract requirement of cross-examination on crucial issues would convert all rulemaking into a full adjudicatory hearing, causing serious delay.[184] By comparison, once ex parte contact rules are established, an agency need no longer worry about their application to a particular rulemaking. Thus, the potential for serious delay does not appear great. Indeed, it may speed things up because the agency will not have to spend time meeting with various interests off the record. But the addition of such a restriction nonetheless inevitably leads informal rulemaking in the direction of formal adjudication.[185]

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[180] 435 U.S. 519, 541 (1978).

[181] Id. at 547.

[182] See 47 C.F.R. § 1 (1979) (FCC rules); 14 C.F.R. § 300.2 (1979) (CAB rules); 16 C.F.R. § 1012 (1979) (CPSC rules). The Consumer Product Safety Commission rules require disclosure of ex parte contacts, whereas the CAB rules ban them. The agencies that have restricted ex parte contacts in rulemaking seem generally to be pleased with the results.

[183] In *Vermont Yankee*, the Court emphasized that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." 435 U.S. at 524.

[184] Ironically, this view was inspired by Judge Wright, a proponent of the ex parte contacts development in rulemaking. See Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375, 387-88 (1974).

Another possible escape route from *Vermont Yankee* lies in the meaning of the "whole record" standard of review arguably present in section 706 of the APA.[186] In *Overton Park*, the whole record requirement was referred to in connection with the "arbitrary or capricious" standard of review, but it is not a concept that has traditionally been applied to informal rulemaking. Informal rulemaking was originally thought to be a process that, like the legislative process itself, did not lead to the creation of a "judicial" record.[187] Recently, however, some courts, by reading the whole record requirement literally, have imported the concept into informal rulemaking review.[188] If this idea takes hold, it is easier to argue, as the court did in *Home Box Office*, that the *whole* record incorporates everything that was before the decisionmaker, including all ex parte contacts. Of course, this interpretation pulls some of the teeth from the *Home Box Office* remedy because it converts the ex parte idea from a prohibitory notion to one that requires disclosure and memorializing instead. But even in this form it effects a significant change in traditional notions of the record associated with informal rulemaking.[189]

Although the *Vermont Yankee* opinion indicates that section 553 rulemaking need not be "based solely on the transcript of a hearing," it also says that the adequacy of a record "turns on whether the agency has followed the statutory mandate of the APA."[190] This statutory mandate, of course, may include the expanded notion of "whole record" in section 706. The most that can be said is that the Court has not clearly stated whether informal rulemaking is bound by record requirements that can be construed to include ex parte contact restrictions as a way of making the record "whole." Since *Vermont Yankee*, however, is the most thorough opinion on this point, its message may supersede anything to the contrary in *Overton Park*. And the message of the later case is that there is a distinct possibility that ex parte contacts should not be forbidden at all in informal rulemaking, or that they should be recorded as part of the rulemaking record but not excluded from its coverage.

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[185] Of course, if one is willing to take the position that informal rulemaking is subject to due process analysis, this formalizing aspect may be viewed as a necessary component of fair decisionmaking. See Note, Due Process and Ex Parte Contacts in Informal Rulemaking, 89 Yale L.J. 194 (1979).

[186] See *Overton Park*, 401 U.S. at 419.

[187] It has always been something of a mystery why the whole-record paragraph should have been placed at the end of the scope-of-review section, since the whole-record concept had been exclusively associated with the substantial evidence test and *Universal Camera*. See 5 U.S.C. § 706 (1976); note 168 supra. The Attorney General's Manual is silent on the application of the whole-record provision except as it relates to the substantial evidence test in § 706(2)(E). See Attorney General's Manual on the Administrative Procedure Act 110 (1948).

[188] See United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).

[189] See Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935).

[190] 435 U.S. at 547.

In the context of informal adjudication, the *U.S. Lines* restriction on ex parte contacts may survive *Vermont Yankee*. The principal concern of the *Vermont Yankee* Court was to protect the organizing scheme of the APA. Since that scheme virtually ignores informal adjudication, there is little that the courts can do to disrupt it.[191] Unless one accepts the extreme position that APA "silence" on the subject of informal adjudication implies a substantive desire not to formulate procedures, the courts seem free to create procedures as needs arise without offending the APA. Indeed, it may be that this incremental approach is exactly what the APA architects contemplated when they decided that a general procedural mechanism for informal adjudication was unworkable.[192] Furthermore, informal adjudication usually implicates due process concerns, creating a separate basis of support for imposing ex parte contact restrictions. In *Vermont Yankee* the Court recognized that, even in some rulemakings, "additional procedures may be required in order to afford the aggrieved individuals due process."[193] As a result of these differences the Court could well conclude that "rulemaking in its purest form" would not justify additional ex parte procedures, whereas informal adjudication or "valuable privilege" rulemaking might. Thus, *U.S. Lines* may survive *Vermont Yankee* while *Home Box Office* might not.

B. *The Application of Ex Parte Principles to the White House*

The foregoing discussion should make courts wary of extending the *Home Box Office* rationale without careful analysis. Since the principle is not even firmly accepted as it relates to private contacts in informal rulemaking, it should be evaluated critically before it is read to prohibit ex parte contacts by the President or the White House staff. Most commentary, however, has done little to acknowledge that presidential contacts present judicial review problems of a different order of magnitude. We are simply told, for example, that the President "ought to be treated like everyone else" when deciding how he should participate in administrative policymaking.[194] But the President is obviously not "like everyone else": he happens to have been elected by "everyone else" to run the executive branch and see that the laws are faithfully executed.

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[191] 191. The APA can be segmented into four procedural boxes created by two dividers: a horizontal "formal-informal" distinction and a vertical "adjudication-rulemaking" distinction. If this is done one finds the informal adjudication box virtually devoid of procedural ingredients. The only potential ingredient is the grounds for denial requirement of § 555(e). See note 153 supra.

[192] 192. The indications are that the designers of the APA were impressed by the complexity of the informal decision process and did not desire to "formalize" it into a single procedural mold. See Final Report of the Attorney General's Committee on Administrative Procedure 35-42 (1941) (informal procedures are "truly the lifeblood of the administrative process"). In fact, the majority of the Attorney General's Committee did not even believe that formal adjudication was susceptible to uniform treatment. It was the minority's views on that subject that prevailed when the APA was enacted in 1946. See Verkuil, supra note 140, at 274-78. Even today there is considerable debate about whether an "Informal Administrative Procedure Act" can ever be a reality. See generally Gardner, The Informal Actions of the Federal Government, 26 Am. U.L. Rev. 799 (1977).

[193] 193. 435 U.S. at 542. Compare Note, supra note 185, at 194.

[194] 194. Senate Hearings, supra note 146, at 148 (statement by Alan Morrison). Mr. Morrison meant by this that the President should be able to participate in informal rulemaking only during the comment period.

First let us consider the impact of *Home Box Office* upon the policymaking activities of the President himself. Meetings that he holds with cabinet-level officers must surely be as protected from scrutiny by the courts as they are from interference by Congress.[195] Article II gives the President the power to demand the opinion of his officers in writing and presumably in oral communication as well. At cabinet meetings or at special sessions held to resolve differences, as in the cotton dust proceeding,[196] the President is acting within his exclusive constitutional power.

When the President participates in rulemaking, he should also be accorded some constitutional consideration, at least as his involvement relates to executive agencies.[197] Can it be that a comment timetable set by the agency in a rulemaking proceeding was meant to bind the President as well? It is hard to take seriously the argument that the President's calendar should be controlled by dates set by agencies for organizing public participation. Indeed, it may make better sense for the President to engage in agency policy coordination after the public has submitted comments for the record, because he and his advisors, as well as the agency, can learn from a review of the comments submitted.

While policy coordination does not necessarily require nonrecord discussions, the President's power to execute the laws will undoubtedly be impaired if he is forced to notify the public of all contacts with the agencies. The concept of executive privilege developed earlier suggests that a degree of secret policymaking may be indispensable to candor in decisionmaking. This analysis would make *Home Box Office* inapplicable to ex parte contacts by the President, because the need for executive privacy outweighs the merely statutory interest in seeing the "whole record" on judicial review. The statutory interest is legitimately subordinated to the President's article II power to execute the laws.

When the participation in agency rulemaking takes place at the White House staff level, article II interests are still present. It is reasonable to assume that the President must delegate some of the policy-coordinating function. Although, as previously indicated, Congress may have the power to require written delegations of authority, when it has not so restricted White House staff activities separation of powers interests balance in favor of off-the-record contacts by the executive branch.[198] The "whole record" concept will not be frustrated by this intraexecutive-branch contact. So long as the agency and the White House staff are bound by the rulemaking record in their policy discussions, staff participation in the decision process must be limited to suggesting outcomes that are supported by that record. Under this approach, agency and White House staff can be viewed as partners in a process of collaborative decisionmaking. But the notion that the executive branch is a single decisionmaking unit is not without controversy.

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[195] See note 97 and accompanying text supra.

[196] See notes 4-10 and accompanying text supra.

[197] Presidential involvement in independent agency rulemaking is less defensible. One would not expect the President to intervene in FCC license allocation decisions or even in rulemaking proceedings where the issues at stake are similar to those in *Home Box Office*. As has been suggested earlier, Congress may have selected independent agencies as a decision vehicle in order to avoid some degree of White House coordination. See note 136 and accompanying text supra. Thus the role of the courts in scrutinizing the whole record may be greater in these situations. As a practical matter, however, the President is not likely to intervene actively in independent agency policymaking.

[198] Although White House staff may not have as crucial a timing problem as the President, they still may desire the benefit of a completed rulemaking record before reviewing or setting administrative policy.

If one accepts the full implications of *Hercules, Inc. v. EPA*,[199] it may be more difficult to justify the idea that executive agencies are all part of a policymaking team centered in the White House. *Hercules* carved out what appeared to be a limited exception from *Home Box Office* for intra-agency ex parte contacts. The contacts were between the EPA judicial officer who presided over the rulemaking proceeding and members of the EPA legal and scientific staff who had appeared before her.[200] The court reluctantly permitted the contacts, because they were undertaken in good faith to assist in understanding the record.[201] The court avoided *Home Box Office* by holding that it did not apply retroactively, deferring the larger issue of its impact upon future ex parte communications.[202] Since the APA's strictures against ex parte communications do not apply to informal rulemaking or to intra-agency contacts,[203] it is a matter of debate how far the courts should go in mandating an equivalent judicial protective device.

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[199] 598 F.2d 91 (D.C. Cir. 1978). The EPA had established regulations limiting discharges of two toxic substances into the nation's waterways. The proceeding was conducted pursuant to § 307(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1317(a) (1976). The act calls for "on the record" determinations, which trigger formal rulemaking procedures under the APA. As the court noted, the rulemaking involves "categorical" or policy determinations, not individual or local determinations. 598 F.2d at 106. Thus, it is rulemaking in its "purest form," rather than valuable-privilege rulemaking.

[200] The EPA had changed its mind about permitting staff assistance, adopting a new regulation to replace an ex parte contact rule that had been applied to separate staff from the decisionmaker. See 40 C.F.R. § 104.14(a) (1976), superseding 40 C.F.R. § 104.16 (1975).

The chief judicial officer, Harriet B. Marple, submitted an affidavit to the reviewing court listing her contacts with agency legal staff and with staff experts. 598 F.2d at 121.

[201] Id. at 127.

[202] The court stated:

> Notwithstanding our decision, however, we feel compelled to record our uneasiness with one aspect of this case—the communication between Ms. Marple and EPA staff legal advocates (Mr. Hall and Ms. Chang). The fact that the attorneys who represented the staff's position at the administrative hearing were later consulted by the judicial officer who prepared the final decision possibly gives rise to an appearance of unfairness, even though the consultations did not involve factual or policy issues . . . .
>
> Amendatory legislation may be justified if agencies do not themselves proscribe post-hearing contacts between staff *advocates* and decisionmakers in formal rulemaking proceedings, lest there be an erosion of public trust and confidence in the administrative process.

Id.

[203] See 5 U.S.C. §§ 544(d), 557(d) (1976). The Senate and House reports state, with respect to § 557(d), that "[C]ommunications solely between agency employees are excluded from the section's prohibition." S. Rep. No. 354, 94th Cong., 1st Sess. 36 (1975); H.R. Rep. No. 880, 94th Cong., 2d Sess. 20 (1976).

Presumably the doctrine the courts evolve for intra-agency contacts will also be extended to executive agency contacts with White House staff. Even under a concept of collaborative decisionmaking, White House staff arguably have no more freedom to make contacts privately than agency staff. Thus, the message the *Hercules* case should hold for the agencies is to note the presence of contacts with White House staff, and proceed to defend the rule on the basis of the record before the agency. *Hercules* is not the final word on this point, but it does counsel a cautious approach. It may be that the executive power under article II gives the President *both* the right to intervene and direct *and* the right to do so in private, whereas the same power gives the White House staff only the right to intervene and direct publicly. This *Hercules*-inspired compromise with article II accommodates the countervailing judicial need to review the record of the decision.

The purpose of whole-record review and the attendant ex parte contact restriction is to ensure that the courts are aware of the factual and policy basis for the rule and that all private contacts and documents pertaining to the rule are available for judicial evaluation. It also informs the courts of the extent to which the rule was subjected to postcomment discussion within the executive branch. It is not necessary for the purposes of whole-record review, however, for courts to know the details of every White House contact, including presidential ones. Any rule promulgated with or without White House assistance must have factual support in the record. That much the courts will guarantee, but they need not be omniscient to perform this role effectively.[204]

When private contacts are funneled through the White House or the agency, the court will inevitably look for them in the rulemaking record. "Conduit" contacts, oral as well as written, are included in the record in order to prevent one side in a policy debate from rearguing its position out of the earshot or view of other sides. Since the core of the ex parte contact restriction is directed at nongovernmental contacts, any system that does not ensure that such private contacts are recorded bears a heavy burden of justification. That, of course, is what *Home Box Office* is all about. But valid executive branch interests are not frustrated by a system that publicizes the conduit function.[205]

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[204] This reasoning does not account for one troubling scenario of presidential involvement. Since all policy decisions are necessarily made within a "zone of reasonableness," it is possible for undisclosed presidential involvement, motivated by political considerations, to direct an outcome that is supported by the record (i.e., within the zone), but yet different from the outcome that would have been reached in the absence of presidential involvement. Cf. Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (holding that a conspiracy to fix rates within a zone of reasonableness could violate the antitrust laws). Within certain limits, in other words, the political process affects outcomes in ways the courts cannot police. Perhaps the best answer to this is simply to recognize that politics is as much part of rulemaking as it is of legislation. Despite the presence of the APA, it is not intended that the courts convert informal rulemaking into a totally "rational" process, unaffected by the presence of presidential power.

[205] The Justice Department's advice to Secretary Andrus and the CEA concerning the recordation of private contacts appears to be a sound rule for the courts to follow as well. See Department of Justice Memorandum, supra note 18. While the strip mining rule was under consideration, the Department suggested, and the CEA accepted, a responsibility for logging all private contacts. The CEA also agreed to place all documents received from private parties in the rulemaking record. See text

With these qualifications, *Home Box Office* and *Hercules* have some relevance to the restriction or recordation of presidential contacts in rulemaking. But they are far from being the guiding precedents for all executive branch activity. *Hercules* must be read in an expansive manner to render it persuasive on the appropriate scope of White House contacts. Ultimately, restrictions on informal rulemaking are better left to congressional resolution, a prospect with which even the *Hercules* court does not quarrel.[206]

U.S. Lines, on the other hand, appears to have more vitality on the question of the scope of White House involvement. It suggests that in informal adjudication, the right of the President to intervene off the record is considerably circumscribed. Even direct involvement by the President may be subject to recordation, because the concept of executive privilege introduced in *United States v. Nixon* can be limited by due process interests implicated in adjudicatory proceedings.[207] There is no inherent executive power to control the rights of individuals in an adjudicative setting.

In summary, the judicial role in controlling White House ex parte contacts involves the application of *U.S. Lines*, with some limited room for *Home Box Office* and *Hercules*. These cases may apply, with modification, to presidential intervention in independent agency rulemaking or White House staff intervention in executive agency rulemaking. But direct presidential intervention in executive agency rulemaking should remain free from judicially imposed record requirements.

V. A Critique of Proposals for Regularizing Presidential Involvement in Agency Policymaking

Several proposals seeking to regularize the policymaking function of the White House are currently before Congress. Of particular interest is a plan, sponsored by the Commission on Law and the Economy of the American Bar Association, to give the President the ability to change policies created by agency rulemakings.[208] In addition, a bill introduced by Senator Culver would explicitly exempt the White House from ex parte contact restrictions,[209] and one introduced by Senator Kennedy would have the opposite effect.[210]

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accompanying notes 21-23 supra. There is no reason why a court should not impose similar standards upon the rulemaking record as part of its function on judicial review.

[206] See 598 F.2d at 127-28.

[207] See text accompanying notes 90-93 supra.

[208] See ABA Commission on Law and the Economy, Federal Regulation: Roads to Reform ch. 5 (1979) [hereinafter cited as Federal Regulation]. A bill embodying the ABA proposal has been introduced by Senator Roth. See S. 1545, Accountability in Regulatory Rulemaking Act of 1979, 96th Cong., 1st Sess. (1979).

In the interests of full disclosure, the author should note that he served as a consultant to the Commission, but his efforts were confined to chapter 6 of the Report. The discussion herein deals only with chapter 5.

[209] S. 2147, The Regulatory Flexibility and Administrative Reform Act of 1979, 96th Cong., 1st Sess. (1979), reprinted in 125 Cong. Rec. S. 19040 (daily ed. Dec. 18, 1979).

[210] S. 1291, The Administrative Practice and Regulatory Control Act of 1979, 96th Cong., 1st Sess. (1979).

A. *The ABA Proposal*

In its important book, *Federal Regulation: Roads to Reform*,[211] the ABA Commission on Law and the Economy proposed a statute authorizing the President to require executive and independent agencies to reconsider or modify regulations that the President finds significantly affect other national interests or statutory goals.[212] The proposed statute would contain subject-matter limitations and procedural safeguards and preclude intervention in licensing or ratesetting proceedings. In addition, it would allow time for Congress to react to presidential directives. It would not disturb existing standards of judicial review.[213]

Inspired by the need to enhance presidential accountability for agency policymaking,[214] this recommendation seeks to provide the President with a forcing mechanism to ensure uniform policy on "critical" national issues.[215] The President is given the power to require executive and independent agencies to consider or reconsider an actual regulation within a specified period of time. If such reconsideration does not take place to the President's satisfaction, the President is free to direct the agency to modify or reverse its decision.[216]

The grant of substantive power to reverse agency policy is cabined by an elaborate procedural structure. Before taking action the President must set forth by executive order in the Federal Register his findings on the questioned action or inaction by the agency involved.[217] Before ordering a modification or reversal, the President must provide a thirty-day written comment period. All comments become part of the public docket, which is designed to include all ex parte contacts between the President, his staff, and interested private persons, as well as discussions between the President, his staff, and the affected agency staff. On this latter point the Commission seeks a compromise, suggesting "that the occurrence of any meeting or discussion . . . be placed in the record, but that the substance of the discussion remain private for the same reason that intra-agency discussions remain private—in order to encourage a full and frank exchange of opinions and advice."[218]

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[211] Federal Regulation, supra note 208.

[212] Id. at 79-80. See generally Note, Delegation and Regulatory Reform: Letting the President Change the Rules, 89 Yale L.J. 561 (1980) (concluding that this resolution contemplates a "dangerously broad delegation").

[213] Federal Regulation, supra note 208, at 80.

[214] The recommendation is based on an earlier proposal by Lloyd Cutler, a member of the Commission, and David Johnson. See Cutler & Johnson, Regulation and the Political Process, 84 Yale L.J. 1395 (1975).

[215] "Critical" regulations are defined as those with "major significance to the national interest" and to the achievement of one or more statutory goals in addition to the statutory goal primarily entrusted to the initiating agency. Federal Regulation, supra note 208, at 80.

[216] Id.

[217] The President's power is derivative. No presidential order could require modification or reversal unless the agency itself had the power so to act. The President would also be bound by an agency's findings of basic fact. See id. at 81-82. Congress is also given a stated time to modify the President's proposed modification or reversal order. If Congress so acts, the President may withdraw his order. Id.

[218] Id. This approach is also followed in the Commission's related recommendation 4, which proposes that the executive branch require review of proposed regulations. Id. at 87.

The Commission's compromise plan seems calculated to gain the support of no political group. While it postulates a statutory grant of clear power to determine policy in the President and his staff, it limits that power in a substantively restrictive and procedurally burdensome manner. Moreover, it may actually offer the President less power over executive agencies than he currently enjoys under article II.[219] Conversely, some members of the Commission and of Congress believe the Commission went too far in granting the President the restricted reversal power that emerged from the recommendation.[220]

The provision restricting ex parte contacts bears further analysis. Although it tries to accommodate conflicting views on White House involvement in the agency decision process, it suffers from the defect of requiring the same public declarations of contacts from the President as from his staff. Arguably, the President has a greater interest in protecting both written and oral communications with cabinet officials from disclosure. Moreover, the concept of executive privilege expounded in *United States v. Nixon* seems to assure the President privacy in communications of this kind. In effect, the Commission proposal seeks to have the President waive some of his inherent power over "critical regulations" in order to achieve a congressionally sanctioned policy control device. Critical regulations, however, do not encompass all executive agency policymaking, and thus the scope of the proposal is not necessarily coextensive with executive privilege in this field. A situation may arise where the President retains his general off-the-record prerogatives while still exercising the limited on-the-record jurisdiction over critical regulations contemplated by the Commission proposal.[221] It seems doubtful that any President would want to accept such a dangerous duality of policymaking control, because it may lead to a reinterpretation of the shifting contours of the executive privilege doctrine.

As for the Commission's proposal on restricting the ex parte communications of White House staff, the notation of meetings with agency staff does not force the President to concede any power under article II. As discussed earlier, the President must be able to delegate duties to staff in order faithfully to execute the laws. But the staff need not have as grand a cloak of privacy to do its job effectively. If Congress can require specific delegations in writing, it could presumably require the recordation of contacts. By keeping the substance of those contacts private, article II interests are adequately protected. Thus, the ex parte contacts provision may form the basis for a modification of existing practice even if the Commission's overall proposal fails to become law.[222]

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[219] Of course, the inherent executive power in article II cannot be modified by the proposal. But if the President acts pursuant to the Commission's plan, he may as a practical matter have foregone his right to act differently on other regulations. Since the independent agencies do little of the truly controversial policymaking, which is usually in the areas of energy, environment, and health, there is more to be lost than gained if the President's freedom to control executive agencies is procedurally circumscribed.

[220] Four of the Commission's 26 members dissented from recommendation 3. The tenor of the dissents was fear of a politicization of agency rulemaking where "political payoffs" might be more the reality than political accountability.

The Senate Governmental Affairs Committee, chaired by Senator Ribicoff, has introduced a major administrative reform package that intentionally omits the Commission proposal for presidential accountability. See S. 262, Reform of Federal Regulation Act of 1979, 96th Cong., 1st Sess. (1979).

[221] The Commission proposal specifically notes that it "would not alter any other existing presidential power derived from the Constitution or other laws." Federal Regulation, supra note 208, at 83. Moreover, the expectation is that the President will invoke the critical regulation power only three or four times a year. Id. at 84.

B. *Ex Parte Contact Proposals*

Congress has before it several bills to reform the APA, at least two of which include sections dealing with ex parte contacts in informal rulemaking. Senator Kennedy has introduced a bill extending ex parte restrictions to informal rulemaking without differentiating in any way between White House and private contacts.[223] It goes beyond the Commission proposal by requiring that written comments and the substance of all oral comments be included in the record.[224] The Kennedy bill simply extends ex parte restrictions from the formal to informal process without qualification. A bill introduced by Senator Culver takes a dramatically different approach. It proposes a new section of the APA on "open communications in informal rulemaking" that explicitly excludes communications within the government, whether or not emanating from the White House, from any restrictions.[225] It is in effect a legislative private contact rule of limited scope.[226]

The Kennedy bill would legislate a full application of *Home Box Office* to all government officials, including those in the White House and the President himself, without any recognition of the distinctly different interests represented by those "outsiders." This approach stands on no better policy footing as a legislative recommendation than it does as a judicial extension of *Home Box Office*. It fails to come to grips with the valid institutional concerns that distinguish the White House from a private participant in the rulemaking process.

The Culver bill, on the other hand, makes a blanket legislative assumption that communications within the government are perforce among insiders. It also in effect overrides cases like *Hercules, Inc. v. EPA*, which try to restrain contacts between officials within an agency, by discarding the concept of qualified agency insider introduced by *Hercules* in favor of a blanket rule for both intra- and inter-agency contacts. One might question whether this approach ignores more subtle differences between government and private contacts. For example, the bill fails to account for the "conduit" possibility: it appears to approve a contact between a private person and a government official that is in turn transmitted from that official to the agency official involved in rulemaking.[227] Even the present administration, which generally favors a maximally permissive ex parte contact rule, has accepted the conduit restraint. Thus, the Culver bill is more liberal on ex parte communications than appears necessary to protect legitimate article II interests.

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[222] The proposal does not deal separately with the conduit problem, but that is probably unnecessary so long as it is construed to include all comments on a particular presidential intervention, whether privately or governmentally inspired. This is the approach taken in the Roth bill. See S. 1545, supra note 208, § 604(c).

[223] S. 1291, § 103, 96th Cong., 1st Sess. (1979) (proposing a new § 553a of the APA).

[224] The only exception is for documents exempt from mandatory disclosure under the FOIA. Id. § 103a. This exception would presumably give some small protection to presidential documents, but not those likely to be circulated in connection with domestic policy coordination.

[225] Proposed § 553a(a)(2) states in relevant part:

> The term "outside communication" means an oral or written communication between an agency official and any person outside the Government which is not on the record and which is relevant to the merits of a rulemaking proceeding for a rule determined to be a major rule under section 621 of this title . . . .

S. 1291, § 103.

[226] It only applies to major rules, which the Culver bill proposes to conduct pursuant to "hybrid" rulemaking procedures. See S. 2147, § 621. The bill is also limited in that it renders the ex parte restrictions inapplicable unless prejudice can be shown on review:

> Upon review, no court shall hold unlawful or set aside any agency action on the basis that this agency failed to comply with the provisions of this section unless (1) the outside communication involved in such failure presented data, views, or arguments which the agency significantly relied upon in promulgating the final rule and (2) the parties to the proceeding had not been given reasonable notice of such data, views, or arguments.

If, however, one had to choose between these two alternatives, there is little doubt that the Culver provision would do less damage. The decisional risks of the conduit problem appear far less serious than the prospect of cutting off all private communications between the President and his agency subordinates. Indeed, that aspect of the Kennedy bill as applied to executive officials might brook serious constitutional challenge should it be enacted.[228]

Of course, there are alternatives other than the two formulated here. It is possible simply to do nothing legislatively and let the present state of the law, with all of its unanswered questions, control outcomes for the future.[229] This course of nonaction is not without merit. It allows the issue to be ventilated and gives the courts an opportunity to structure the constitutional issues more clearly. But its drawback is obvious: it prevents a clear and prompt resolution of the matter, thus frustrating or inhibiting the executive branch and the agencies. Until the cloud on ex parte contacts is lifted, many agency officials, especially those in the independent agencies, will be uncomfortable with White House involvement and will resist presidential influence. It is therefore desirable to develop a workable ex parte contact rule from the various interests that have been advanced.

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[227] It would be possible to read the phrase "any person outside the government" as applying to such a person whether or not the communication is "laundered" by contact with an intervening White House official. But there is certainly nothing in the currently available legislative history that would support this interpretation. See 125 Cong. Rec. S19,060 (daily ed. Dec. 18, 1979) (section-by-section analysis).

[228] The argument would be that *Myers* and *Nixon* apply the concept of executive privilege to policymaking relationships with executive agency officials.

[229] This seems to be the approach taken by other administrative reform bills, which do not address the ex parte contacts issue. For example, the bill introduced by Senator Ribicoff, S. 262, see note 220, supra, was silent on ex parte contacts. Since this bill was preceded by one of the most comprehensive committee reports ever produced in the field of administrative reform, its silence should not be taken lightly. See Senate Comm. on Governmental Affairs, Study on Federal Regulation, 96th Cong., 1st Sess. (1979) (Vols. I-VI).

On May 8, 1980, the Senate Judiciary Committee agreed on an amendment to S. 262 that was substituted for the ex parte contacts provision of the Culver bill. The provision reads as follows:

> (f) Within one year after the enactment of this legislation, each agency shall conduct rule making proceedings in accordance with section 553 of this title to consider procedures for dealing with ex parte communications in informal rule making proceedings.

S. 262, § 201(f). This amendment seems to defer the ex parte contacts issue; it certainly does not resolve it, because agencies are likely to take a variety of approaches to the problem, including the question of whether the White House should be included within any proposed restraints.

VI. RECOMMENDATIONS

The preceding discussion demonstrates that extending ex parte contact principles to the White House is not to be undertaken lightly. It is far from obvious that ex parte principles should be extended to informal rulemaking in any event,[230] but even if they are, there are sound institutional reasons for distinguishing between presidential and private contacts in the rulemaking process. The President cannot logically be held to the same standards as private persons for participation in the informal rulemaking process. Any limitations on off-the-record contacts by the President should be applied cautiously. Such limitations should apply principally to independent agencies; they should relate only to informal adjudication or valuable-privilege rulemaking, not to "pure" informal rulemaking; and they should focus on contacts between private interests and White House staff that affect the outcome of rulemaking. These principles should form the basis of any legislative, judicial, or administrative solutions to the problem of presidential intervention.

If Congress desires to legislate on the subject, it could adopt the Culver Bill without any danger of interfering with the executive function. The bill exempts all "government officials" from the ex parte contact provisions and thereby grants the President and the White House staff unrestricted access to agency policymakers. On the other hand, if Congress wanted to modify the Culver Bill, it could do so without necessarily trampling upon article II interests. Such modifications might proceed along the following lines. Ex parte contact restrictions could be extended to written, rather than oral, contacts by government officials other than the President.[231] Written comments received by White House staff directly from private parties should also be included as part of the rulemaking record.[232] This approach follows part of the proposal suggested by the ABA Commission on Law and the Economy. Written contacts should be made part of the record because they are likely to be substantive in nature and could affect the outcome of the rulemaking. There should be no requirement that these written contacts be submitted in accordance with the timeframe established for public comment, but they should be placed in the record before the rule is finally promulgated.[233] Limiting contacts to the public comment period would reduce the value of public comments to the agency and to the executive branch. Post-comment contacts are important precisely because they are informed by the comment process itself.

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[230] See generally Scalia, *Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345; Scalia, The Judicialization of Standardless Rulemaking—Two Wrongs Make a Right, 1 Regulation 38 (July/Aug. 1977).

[231] Whether the President's written contacts can be covered is a close question. On the one hand, most of the jawboning that is likely to occur with his subordinates will be done on an informal, oral basis. One would surmise that written communications are more prone to be substantive and therefore more logically part of the rulemaking record. There is certainly the possibility, however, that a President may want to send a sharp note of displeasure to a subordinate that he would want to keep private.

[232] See, e.g., the CEA procedure, discussed in note 205 supra.

The treatment of oral contacts by the President is a more difficult issue. If the article II privilege is to have any meaning, the substance of such contacts should be outside the record. Moreover, the fact of the contact itself may have to be private so as not to distort the exercise of the President's coordination power.[234] Oral contacts by White House staff should also be privileged, but the privilege should not attach to the same extent as it does for the President. The substance of such contacts should be shielded from scrutiny because it will be difficult to describe them explicitly without, in effect, requiring another "record" to be made.[235] White House staff are likely to meet repeatedly with agency officials to discuss the public comments and the decision rationale behind critical regulations, rendering it extremely difficult to isolate the substance of White House staff discussions from discussions within the agency itself.

The privacy interests implicated by recordation of White House staff contacts with the agency can yield without greatly disrupting the coordination powers of the Presidency. The compromise suggested by the Commission on Law and the Economy with respect to recordation of oral contacts may be the best way to resolve the competing interests.[236] So long as such notations are limited to White House staff contacts, the President should have sufficient flexibility to intervene privately, and the courts can still evaluate the relevance of White House involvement to the decision process.[237]

These restrictions are not inconsistent with a strong view of the President's power to coordinate agency policymaking. Congress must recognize that regulation of direct presidential contacts is as much a restraint upon its own control over executive agency policymaking as it is upon the President's control. Unnecessary formalities will frustrate presidential accountability efforts, thereby depriving Congress of a ready ally in the fight against an increasingly unaccountable bureaucracy.

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[233] There is precedent for this delayed creation of a rulemaking record by the insertion of relevant documents after the close of the public comment period. The 1977 Clean Air Act amendments define the "record" as follows: "All documents which become available after the proposed rule has been published and which the administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability." 42 U.S.C.A. § 7607(d)(4)(B)(i) (Supp. 1978). The statute also makes clear that the rule must be based on data received in the docket by the date the rule is promulgated. See id. § 7607(d)(6)(C). This date has been interpreted to mean the date the final rule is signed by the Administrator and released to the public, not the date on which it appears in the Federal Register. See American Petroleum Inst. v. Costle, 609 F.2d 20 (D.C. Cir. 1979).

[234] If the fact of contact were public, the President would have to weigh the attention such contacts would bring to a particular rulemaking proceeding. Where several conversations are involved, the cumulative impact might become a separate inhibiting consideration.

[235] The views of the *ACT* court are relevant here. The court speculated that it would ultimately have to require conversations to be recorded or administer a lie detector test to determine if summaries are accurate. See Action for Children's Television v. FCC, 564 F.2d 458, 474 (D.C. Cir. 1977).

[236] See text accompanying note 224 supra.

[237] Even *Hercules, Inc.*, which expressed concern about the integrity of the decision process by contact between agency deciders and agency "advocates," accepted a recordation of contacts rule as satisfactory for judicial review purposes. See notes 199-202 and accompanying text supra.

But Congress is only part of the picture. Whether or not new legislation is forthcoming,[238] the courts reviewing informal rulemaking should cautiously apply cases such as *Home Box Office*, *U.S. Lines*, and *Hercules*, since they involve a variety of decision contexts other than informal rulemaking. The following factors may prove helpful in resolving particular cases: (1) Ex parte contact restraints should not apply when the President has a direct policymaking stake in the outcome of rulemaking; (2) The courts should be alert to the distinctions among pure informal rulemaking, informal adjudication, and valuable-privilege rulemaking, since the latter two are situations in which interests of due process and judicial review may override article II interests; (3) Off-the-record contacts by White House staff may not deserve judicial deference unless the President's involvement is made known through these contacts; (4) A decisional rule limited to requiring recordation of written rather than oral contacts by the White House staff may prove workable; (5) A recordation or even a publication rule limited to independent agency policymaking would run little danger of frustrating presidential prerogatives.

While there will undoubtedly be difficult choices to make in the future, these factors should assist courts in identifying the valid interests of the executive branch. Ultimately the judicial role in informal rulemaking review should respect the President's need to confer with and direct executive agency policymaking. The need for a record, important as it may be, should not override all other interests, including the principle that it is the President who must coordinate and direct agency policymaking as part of his article II duties and powers.

For the agencies the problem is most immediate. They seem to be responding well to the challenge of occasional presidential intervention in rulemaking. The executive agencies whose policymaking has attracted the most attention appear to be able to handle presidential oversight while still retaining final decisional authority. In the situations where they have been criticized for yielding to White House pressure, the agencies seem instead to have responded responsibly to an inherently difficult situation. It is never easy for administrators to receive policymaking guidance from outside the agency, but to reject executive branch involvement unilaterally is not a politically realistic course of action. At a time when no agency can be too confident of the correctness or economic impact of any policy choice in the areas of health, safety, or the environment, participation by the President and the White House staff seems desirable as well as inevitable. It would be foolhardy for an executive agency strictly to prohibit presidential ex parte contacts where no restriction is called for by Congress or by due process. Jawboning by the President is not something from which agencies any more than private industry have a right to be free.

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[238] If Congress does legislate on ex parte contacts by the White House, it should separately address the problem of judicial review. It would do well to include the harmless error concept introduced in the Culver bill. See note 226 supra.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: A SELECTED BIBLIOGRAPHY

1968–1980

*Sue Judith Boley**

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Topics for inquiry may be chosen by the Chairman of the Conference, the Council, the committees, and the Assembly.† In most cases a consultant is hired to perform in depth research in the area of concern. The consultant and staff of the Office of the Chairman work closely with Conference committees in drafting recommendations to be considered for adoption by the Assembly. The Assembly may approve, amend, remand, or reject recommendations presented by committees. Adopted recommendations may result in new congressional legislation or direct action on the part of the affected agencies.

The product of the Conference takes two principal forms: staff or consultant reports, and Conference recommendations and statements. Recommendations and statements adopted by the Assembly are published in the *Federal Register* (Fed.Reg.), and in most cases (depending on continuing general interest) in the *Code of Federal Regulations* (1 C.F.R. § 305). Staff and consultant reports often are published as periodical articles or monographs, or serve as the basis for such publications.

Texts of all recommendations and statements and the reports that led to them, are published in a four volume series entitled RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES and its successor series, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS (both herein cited as ACUS). Statements, however, do not appear in the series after 1977. Full texts of adopted recommendations and statements also appear in the corresponding annual report of the Administrative Conference. Miscellaneous staff and consultant reports not leading to formal recommendations and not published in journals or monographic form are made available for distribution by the Conference.

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* Librarian and Information Officer, Administrative Conference of the U.S. Earlier bibliographies appear at 30 AD. L. REV. 303 (1978) and 33 AD. L. REV. 235 (1981).

† For further information about the organization of the Administrative Conference see: [1980] ACUS ANN. REP., Wash., D.C., U.S. Gov't Printing Office (1981) (Superintendent of Documents No. Y3. Ad6:1/1981). *See also* 1 C.F.R. §§ 301.1 to 310.5.

This bibliography covers the major work of the Conference from its first Plenary Session in May 1968 through the twenty-second Plenary Session in December 1980. During this period 84 recommendations were adopted along with 6 formal statments, all of which were based on reports prepared by consultants, staff, or committees. Included herein are 121 reports of consultants and staff (committee reports excluded): 66 of these resulted in recommendations; 5 led to Conference statements; and 50 did not lead to Conference action.

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